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Supreme Court of the United States

OCTOBER TERM, 1964

No. 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, PETITIONER,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES.

No. 369

NATIONAL MEDIATION BOARD, ET AL., PETITIONERS,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 138 PETITION FOR CERTIORARI FILED JUNE 1, 1964
NO. 369 PETITION FOR CERTIORARI FILED AUGUST 10, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,068

NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., Individually and as Chairman of the National Mediation Board; LEVERETT EDWARDS, Individually and as Member of the National Mediation Board; and HOWARD G. GAMSER, Individually and as Member of the National Mediation Board, *Appellants*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Appellee*

No. 18,072

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Appellants*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Appellee*

On Appeal from the United States District Court for the District of Columbia

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CONSOLIDATED JOINT APPENDIX

Relevant Docket Entries

1963

Apr. 13—Complaint, appearance Exhibits A thru C

Apr. 13—Summons, copies (6) and copies (5) of Complaint issued.

Apr. 13—Motion for Preliminary Injunction.

Apr. 13—Affidavit of James F. Sheahan.

Apr. 18—Motion of pltff. for temporary restraining order.

Apr. 18—Temporary Restraining Order, $100.00 undertaking; motion for preliminary injunction set for April 24, 1963; Issued at 2:27 P.M.

Apr. 22—Opposition of defts to pltffs motion for preliminary injunction; memorandum; affidavit; exhibits 1 thru 22, 24 thru 28.

Apr. 24—Motion for preliminary injunction argued & submitted; temporary restraining order continued to 10:00 A.M., April 25, 1963.

Apr. 25—Exhibit by pltff, numbered 23.

Apr. 24—Order extending temporary restraining order to 10:00 A.M. on April 25, 1963 & thereafter until the Court files its order. All ser. 4-24; Atty. Gen. ser. 4-26; US Atty. ser. 4-24—Youngdahl, J.

May 3—Exhibit (notice of election).

May 3—Findings of Fact, conclusions of Law; order granting motion for preliminary injunction, deft to have one week to show cause why injunction should not be made permanent, & remanding to the Board the request of pltff for hearing relating to appropriateness of class or craft; & memorandum. (N)

1963

May 8—Motion of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Stations Employees for leave to intervene as party deft;

May 10—Opposition of pltff to applicant's motion to intervene;

May 10—Response of defts to order to show cause.

May 10—Motion of defts to dismiss or in the alternative, for summary judgment; affidavit; P & A; statement of material facts;

May 10—Order amending memorandum of Court by deleting sentence therefrom. (N)

May 13—Reply of Brotherhood of Railway & Steamship Clerks Freight Handlers, Express & Stations Employees to pltff's memo in opposition to motion for leave to intervene as deft;

May 22—Reply to pltff to motion to dismiss, etc & response to order to show cause;

May 29—Order denying motions of deft. #1 to reconsider or vacate preliminary injunction or to dismiss or for summary judgment; making final the preliminary injunction granted 5-3-63; remand to deft. #1 the request of pltf. for hearing.

May 29—Order permitting Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees to intervene as deft. (N)

May 29—Memorandum readopting & supplementing the memorandum of May 3, 1963.

July 16—Notice of Appeal of intervenor deft.;

July 26—Notice of appeal of deft 2, 3, & 4.

Aug. 23—Record delivered to USCA.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 973-'63

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Plaintiff*,

vs.

NATIONAL MEDIATION BOARD, LEVERETT EDWARDS, Individually, and as Chairman of the National Mediation Board, FRANCIS A. O'NEILL, JR., individually and as a member of the National Mediation Board, and HOWARD G. GAMSER, individually and as a member of the National Mediation Board, *Defendants*.

Complaint

Plaintiff, Association for the Benefit of Non-Contract Employees, complains of the defendants as follows:

I

Plaintiff is a non-profit corporation organized and existing under the laws of the State of California. Membership is composed of personal service and clerical employees of United Air Lines, a common air carrier; said members are employed in the several States of the Union wherein United Air Lines maintains offices.

II

The defendants, LEVERETT EDWARDS, FRANCIS A. O'NEILL, JR. and HOWARD G. GAMSER are members of the National Mediation Board (the "Board"), appointed thereto by the President of the United States. The defendant, National Mediation Board, is an agency established under the Railway Labor Act (the "Act"). 45 USC, § 151 et seq. All defendants are located in the District of Columbia.

III

The action arises under the Constitution of the United States and the Railway Labor Act. Plaintiff seeks to enjoin defendants from conducting a representation election within a certain designated "craft or class" of employees of United Air Lines, among which plaintiff's members have been included; and to enjoin defendants from certifying any representative for such craft and class until the Board grants a public hearing allowing plaintiff to be heard with respect to appropriateness of the class and craft designated. Plaintiff further seeks to enjoin defendants from conducting any election wherein the form of the ballot ordered and used by defendants does not afford plaintiff's members the right to vote for or against representation.

Plaintiff's members are employed by United Air Lines under individual bargaining agreements. Plaintiff's members desire the opportunity to vote as to whether such individual bargaining agreements may be retained by them.

The matter in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs. Federal jurisdiction is based on 28 USC, §§ 1331 and 1337.

IV

The Act applies to both air and rail carriers; in substance it provides that carrier employees shall have the right to organize and bargain collectively through representatives of their own choosing; that no carrier or agent thereof shall require its employees to sign any agreement promising to join or not to join a labor organization; and, that the majority of employees of any craft or class shall have the right to determine who their representative shall be. (45 USC, § 152, Fourth and Fifth). It further authorizes the Board in the event of a representation dispute to in-

vestigate upon the request of a party to the dispute, and to certify individuals or organizations to represent the class or craft of employees involved. (45 USC, § 152 Ninth).

V

On or about August 24, 1962, the Brotherhood of Railway and Steamship Clerks, Frieght Handlers, Express and Station Employees (the "Brotherhood"), a labor organization proceeding under USC 45, § 152, Ninth, requested the Board to investigate a represenation dispute concerning employees of United Air Lines described as clerical, office, stores, fleet and passenger service employees. The other party to the dispute was the International Association of Machinists (the "IAM"). The Board took jurisdiction and docketed it as case R-3590, recognizing the Brotherhood and the IAM as parties in interest.

VI

The class or craft involved in the dispute consists of approximately 12,300 employees of United Air Lines. 6,400 members of the plaintiff are included in this class or craft primarily in clerical and passenger service categories.

VII

The employees of United Air Lines, in November, 1962, were informed that the Board proposed to call an election for a bargaining representative of the above class or craft of employees. Thereafter, plaintiff, a non-profit corporation, was organized and formed to petition the Board. On February 13, 1963, plaintiff petitioned the Board for a public hearing to: (1) Divide the craft or class into three units, passenger service, clerical, ramps and stores. (2) In the event of a denial, to provide a ballot upon which plaintiff's members would have an opportunity to vote for or against representation.

VIII

The Board on March 27, 1963, denied said petition. Copies of plaintiff's petition and the Board's decision are attached hereto as Exhibits "A" and "B" respectively and expressly made a part hereof. Plaintiff on April 5, 1963, filed a request for re-consideration of the decision. The Petition for Re-Consideration is attached hereto as Exhibit "C", and expressly made a part hereof. The plaintiff's Petition for Re-Consideration was denied by the Board on April 12, 1963.

IX

The craft or class concerned was designated by the Board some 15 years ago in docket R-1706. It is made up of diverse and unrelated classifications, such as baggage handlers, accountants, stenographers, passenger agents and electronic computer technicians. The members of these classifications have different working conditions and relations with United Air Lines. This combination creates a craft or class for which a single bargaining agent cannot fairly and adequately represent the diverse interests of all concerned. Plaintiff's members seek the opportunity to preserve individual bargaining agreements by voting for or against represenation.

X

The Board set forth three grounds upon which it made its decision denying plaintiff's petition. One, that plaintiff was not authorized to appear before the Board for collective bargaining. Two, that plaintiff did not seek to be on the ballot. And three, that plaintiff did not intend to bargain collectively. This decision is arbitrary, capricious and discriminatory, and exceeds the jurisdiction of the Board in that it denies to plaintiff's members the right to express themselves as either for or against representation and continues them in a craft or class in which a single

bargaining agent cannot fairly represent their rights. The procedure of the Board wherein an opportunity is denied to a majority of the class or craft to vote for or against representation and fails to advise them of that right, deprives the plaintiff of its right to due process under the Fifth Amendment to the Constitution of the United States.

XI

The Board's decision that plaintiff is not entitled to a hearing on the ground that it did not seek or intend to bargain collectively violates the Due Process clause of the Fifth Amendment to the Constitution in that it is a deprivation of bargaining rights, in that it denies the correlative rights to bargain or not to bargain and is arbitrary, capricious and discriminatory and is outside the powers of the Board.

XII

The Board has scheduled an election for this craft and class on April 22, 1963. In providing a ballot for such election, the Board has stated that it will use a ballot form on which no space or section is provided within which a voter can vote no. This form of ballot will afford only the opportunity to vote for the Brotherhood, the IAM, or a write-in representative. For the reasons set forth herein this action is arbitrary, capricious and discriminatory and in excess of the powers of the Board, in that it deprives plaintiff's members of their bargaining rights under the Act.

XIII

There is no statutory procedure for review of the Board's procedures, if the Board refuses to recognize plaintiff; if the Board refuses to conduct a hearing as to the composition of the craft or class; holds an election; and, refuses to provide a ballot form which permits a vote for or against

representation, plaintiff's members will be without adequate remedy at law with which to seek a review of the Board's unlawful acts or to assert their constitutional rights to due process. Unless restrained the Board will conduct such an election and plaintiff's members will suffer irreparable injury and damage to their rights and property.

WHEREFORE, plaintiff prays as follows:

1. For a preliminary injunction to be made premanent after a final hearing.

(a) Restraining defendants from conducting any election in the class or craft referred to herein, among the employees of United Air Lines under National Mediation Board number R-3590 or any other number, unless the Board shall: 1. Conduct a hearing relative to the appropriateness of the class or craft designated; 2. Afford plaintiff status as a party in interest at said hearing; and 3. Offer a ballot upon which voting employees can vote for or against representation.

2. For whatever further relief the Court may deem meet and proper in the premises.

DATED: April 12, 1963

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

By

/s/ _____

JAMES F. SHEAHAN, *President*

ARGUELLO. GIOMETTI. MCCARTHY

By

ALEX L. ARGUELLO

Attorneys for Plaintiff

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO } ss

JAMES F. SHEAHAN, being first duly sworn, deposes and says:

That he is the President of the Association for the Benefit of Non-Contract Employees, a California corporation, the above named plaintiff, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

ASSOCIATION FOR THE BENEFIT OF
NON-CONTRACT EMPLOYEES

By

/s/ _____

JAMES F. SHEAHAN, *President*

Subscribed and sworn to before me
this 12th day of April, 1963.

MARVIN G. GIOMETTI
Notary Public

In and for the City and County of
San Francisco, California.
(Commission Expires: 4/26/63)

Exhibit "A"

February 11, 1963

MR. LEVERETT EDWARDS, *Chairman*
National Mediation Board
Washington 25, D. C.

Re: Case R-3590
Association For The Benefit of
Non-Contract Employees

Dear Sir:

We submit herewith on behalf of the Association For The Benefit of Non-Contract Employees and the five undersigned individuals a Petition For Relief before the National Mediation Board as follows:

1. The petitioners herein and the Association For The Benefit of Non-Contract Employees, as of this date, represent 5100 employees, in the Customer Contact and Office and Clerical group, of United Air Lines. This representation is evidenced by signed representation cards from each of said employees.

2. The petitioners hereby apply for leave to intervene in National Mediation Board Representation Case R-3590, as a party in interest on behalf of the 5100 employees who have appointed the petitioners. In addition to being granted permission to intervene, the undersigned do further request the following specific action from the National Mediation Board.

(a) That the pending election in case R-3590 be deferred until there be a re-determination of the class or craft of employees to be involved in the election.

(b) That the National Mediation Board, basing its action on information already before it, make a re-deter-

mination of the employees presently in the bargaining unit into three groups compromised [sic] of:

1. Office and clerical employees.

2. Customer contact employees.

3. Ramp and stores employees.

each of which should be determined to be a separate class or craft for purposes of this representation case, and for future representation proceedings involving these employees.

(c) In the event that insufficient facts are presently on file or if the Board declines to re-determine the class and crafts on its own motion, the undersigned hereby petition the National Mediation Board to fix a time and place for a hearing, at which petitioners and all interested parties and persons may present evidence, argument and authorities bearing on that issue; and that on the evidence thus presented, the National Mediation Board re-determine the class and craft as requested.

(d) In addition to the foregoing and notwithstanding the ultimate determination of class and craft of the National Mediation Board in Case R-3590 petitioners hereby request the National Mediation Board to prepare and use in this representation election, a form of ballot which provides on its face, a place for employees to vote affirmatively that there be no bargaining agent elected to represent their class or craft. This request is based on National Mediation Board practice of using ballots which provide the voter only the opportunity of choosing between bargaining agents.

(e) In the event that the National Mediation Board declines to use a ballot as requested, (i.e. a ballot providing a place for a "no-union" vote), then petitioners request the Board to issue a statement to petitioners, in advance of the

election, explaining how a voter may register as his choice that no union be certified to represent him.

3. The request for re-determination of the class and craft is based upon numerous reasons, including the following, each of which will be proved by petitioners with appropriate evidence and authority in the event of a hearing. (1) The class and craft heretofore established by the National Mediation Board for this election includes approximately 12,500 employees of United Air Lines in widely different job categories. There is no history of collective bargaining common to these diverse groups. In fact, one group (ramps and stores) is presently unionized, while the others (customer contact and office and clerical) have never been unionized in the system. (2) Determination of customer contact and office and clerical employees to be separate classes and crafts is easily accomplished because they are readily identifiable units under both company personnel procedures and nature of work performed. (3) The National Mediation Board determination in R-1706, January 31, 1947 was prior to the significant post war operational developments of the airlines industries. These developments show that office and clerical, ramp and stores employees and customer contact employees are separate classes and crafts and should be treated as such. (4) The employees in these classes and crafts do not desire to be joined in one bargaining unit. (5) There is widely different job-training in the different job categories. (6) The nature of their work is significantly different. (7) There is no aspect of interchangability of personnel between the different job classifications. (8) Vital interests of each category prevents fair representation of all three groups by one bargaining agent without a serious conflict of interest or a potential conflict of interest.

Copies of this petition are being sent to the Brotherhood of Railway Clerks, International Association of Machinists and United Air Lines. It is requested that all communica-

tions regarding this petition be sent to the undersigned in care of the Association For the Benefit of Non-Contract Employees, 244 Kearny Street, San Francisco, California.

Respectfully submitted,

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

By _____

President

Exhibit "B"

NATIONAL MEDIATION BOARD
WASHINGTON

March 27, 1963
Case R-3590

Mr. James F. Sheahan, President
Association for the Benefit of
Non-Contract Employees
244 Kearny Street
San Francisco, California

Dear Mr. Sheahan:

Reference is made to our letter of March 8, 1963, making formal acknowledgment of communication dated February 11, 1963, signed by yourself and several others on behalf of the Association for the Benefit of Non-Contract Employees. Your communication, referred to above apparently constitutes a petition for action by the National Mediation Board on various subjects. The communication has been considered by the Board in executive session.

In paragraph 2 of said communication, the petitioners apply for leave to intervene in Case No. R-3590 as a party

at interest on behalf of 5,400 employees. This number was subsequently amended to 6,400 by Attroney Alex L. Arguello's letter dated March 8, 1963. The petition requests the following specific actions by the Board:

1. Defer the pending election in Case R-3590 until there be a redetermination of the class or craft of employees involved in the election.

2. Make a redetermination of the employees presently involved into three groups composed of:

   (a) office and clerical employees

   (b) customer contact employees

   (c) ramp and stores employees

   each to be determined as a separate craft or class for the purposes of this representation case and for future representation proceedings involving these employees; and,

3. In the event that insufficient facts are presently on file, or if the Board declines to redetermine the class or craft on its own motion, the petitioners request the Board to fix a time and place for a hearing at which the petitioners and all parties at interest may present evidence, argument and authorities bearing on that issue, and on the evidence thus presented, the Board redetermine the class or craft as requested;

4. Prepare and use in this representation election a form of ballot which provides, on its face, a place for employees to vote affirmatively that there be no bargaining agent elected to represent their class or craft; and,

5. In the event the Board declines to use a ballot as requested (i.e. a ballot providing a place for a "no-union" vote), then the petitioners request the Board

to issue a statement to petitioners in advance of the election explaining how a voter may register his choice that no union be certified to represent him.

The National Mediation Board has given full consideration to all the points raised in your petition, and has concluded that each and all of the requests made in your petition, as enumerated above, should be, and are hereby denied for the following reasons:

The Association for the Benefit of Non-Contract Employees, in this petition, does not ask leave to intervene in this representation dispute as a party to that dispute, as described in Rule 1206.5 of the Board's Rules, which appears in the Code of Federal Regulations, Title 29, Chapter X. An intervenor, as described in Rule 1206.5, is construed to mean an organization or individual which presents to the Board proved authorizations from at least 35% of the craft or class involved, which on their face authorize such organization or individual to represent the employees concerned for the purposes of collective bargaining under the Railway Labor Act. Also, the purpose of intervention, under Rule 1206.5, is to "warrant placing the name of the intervenor on the ballot."

The "authorization" cards submitted on behalf of ABNE contain the following language:

"I hereby authorize the hereinafter named persons to act in my behalf as incorporators and directors for the purpose of forming and directing the affairs of a corporation to be known as an 'Association for the Benefit of Non-Contract Employees' of which I shall be a member.

"These same individuals are hereby authorized and empowered to represent me before the National Mediation Board.

"The execution of this instrument revokes any authorizations heretofore made for the appointment of a representative."

This language does not authorize the ABNE to represent the signatory for the purposes of collective bargaining under the Railway Labor Act, and the cards, therefore, cannot be recognized by this Board as "authorizations", as mentioned in Rule 1206.5, for the purposes of a proceeding under Section 2, Ninth, of the Railway Labor Act.

In addition, the Board has taken note of the statements made in the postscript to a letter of February 23, 1963, which you published, namely, "(1) We are not seeking recognition as a bargaining agent; we do not want our name on the ballot"; and "(4) Our Association will be dissolved after such time as it has served its purpose." It is obvious from these statements that the ABNE does not hold itself out as a representative for the purposes of collective bargaining under the Railway Labor Act, and accordingly, the Association cannot be considered by the National Mediation Board as a bona fide intervenor in Case No. R-3590.

Section 2, Ninth, of the Railway Labor Act provides for certain actions by the National Mediation Board to resolve disputes among a carrier's employees "as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act. . . ." This language implies contests between "parties" for the right to represent the employees involved in the dispute. By your own statements, you have disavowed any intention of the ABNE to bargain collectively for the employees concerned. Under the provisions of the Railway Labor Act, therefore, the Board is unable to recognize the Association as a proper "party at interest" in Case No. R-3590.

Lacking that essential qualification, the petition from the Association for the Benefit of Non-Contract Employees is hereby dismissed.

By direction of the NATIONAL MEDIATION BOARD.

/s/ E. C. THOMPSON
E. C. Thompson
Executive Secretary

cc: Harrison, Hayes, Mason, Arguello

Exhibit "C"

April 3, 1963

MR. LEVERETT EDWARDS, Chairman
National Mediation Board
Washington 25, D. C.

Re: Case R - 3590
Association For the Benefit of
Non-Contract Employees

Dear Sir:

This letter is in reply to the decision of March 27, 1963, wherein the National Mediation Board denied the petition of the Association for the Benefit of Non-Contract Employees theretofore submitted on February 11, 1963.

Request is made herewith that the Board reconsider its denial made as above stated and review once again the various points and requests made in that petition and in this letter.

As of March 8, 1963, the Association for the Benefit of Non-Contract Employees represented 6,400 of the employees in the class or craft with which this case is concerned. Since that time additional members of the class or craft have allied themselves with the Association for

the Benefit of Non-Contract Employees. The petitioner represents a majority of the bargaining unit with which the Board intends to deal. The Board's denial is based upon the ground that the Association for the Benefit of Non-Contract employees does not wish to act as a representative for the purpose of collective bargaining under the Railway Labor Act. In this regard, it is respectfully called to the attention of the Board that the term and right "collective bargaining" must necessarily contain in it the right to act or not to act. In this instance and at this time, the Association for the Benefit of Non-Contract Employees has petitioned the Board depending on that co-relative right not to act.

It is difficult to realize how the Board on any ground, however technical, can refuse to hear from the representative of the majority of a class or craft.. If the Board fails to reconsider its position, any action taken with respect to this dispute will create the anamolous situation in which the very employees which the National Mediation Board is charged to protect are being wrongfully discriminated against.

The Board's decision has effectively limited the right of these employees to be heard, even through the medium of the election now being arranged by the Board. Without regard to the technical status of the petitioning parties the Board is now sufficiently advised with respect to the will of a large number of employees in the group that a "no vote" should appear on the ballot, so as to permit this large group to express themselves even though without the status demanded by the Board. Previous action on the part of the National Labor Relations Board has established precedent wherein a "no vote" has appeared on the election ballot. Without regard to the action taken with reference to the Association for the Benefit of Non-Contract Employees petition, the Board can still, on its own motion, take this action with respect to the election

ballot and thus provide a fair and non-discriminatory atmosphere in which the forthcoming election can be conducted.

It should be further noted that prior to the submission of the petition on behalf of the Association for the Benefit of Non-Contract Employees, representatives of the employee group traveled to Washington, D. C. and met in a body with Mr. E. C. Thompson, Executive Secretary of the National Mediation Board. At that time a copy of the authorization card was shown to Mr. Thompson and his comments thereon were elicited. While it is recognized that Mr. Thompson's action did not constitute an official act of the Board, the representatives of the Association for the Benefit of Non-Contract Employees were at that time advised by Mr. Thompson that the language of the cards was sufficient to evidence the act of the individual employees in authorizing the Association for the Benefit of Non-Contract Employees to act on their behalf.

The Association for the Benefit of Non-Contract Employees, as is known to the Board, is a new association, formed quickly, to meet the demands of the situation created by the Brotherhood of Railway Clerks, and the announced intention of the Board to hold an election wherein this group of employees is to be afforded an opportunity to vote for one union or another. This alternative does not meet with the approval of these employees, and this association manifests its intention to avoid that choice. The expedient of destroying a ballot of the National Mediation Board, or otherwise disposing of it, does not appear to the Association of Non-Contract Employees to faithfully reflect the democratic process. The Association for the Benefit of Non-Contract Employees therefore sought and seeks the opportunity to record its "no vote" on the ballot circulated by the Board which represents the United States in this dispute. No official action of the Board of Directors of the Association for the Benefit of Non-Con-

tract Employees has authorized the Association or any of its representatives to refuse to collectively bargain with United Air Lines. On the contrary, the Association for the Benefit of Non-Contract Employees does seek status as the bargaining agent for this class or craft. The majority employee group represented by the Association for the Benefit of Non-Contract Employees in this regard desires no union representation. The Association for the Benefit of Non-Contract Employee's bargaining position must therefore be against union representation. The only manner in which this bargaining position can be maintained is by the expedient of obtaining a "no vote" on the ballot. The Association for the Benefit of Non-Contract Employees again respectfully urges that the interest of this majority group is in equity and in the light of the fundamental and traditional rights of the workers one which should not be ignored.

While the Association for the Benefit of Non-Contract Employees does not seek to evoke its right to union representation, it seeks an equally important right, the freedom from union representation, which is an inherent right granted to employees in all American labor concepts.

The Association for the Benefit of Non-Contract Employees does not in any sense by this petition waive any of the other points propounded in its original petition, and in this light repeats the request that the class or craft established by the National Mediation Board some 15 years ago is in the light of intervening developments in changes in the industry so heterogeneous and diverse as to group together such widely disparate occupations within the airline as to create an unwiedly and dissonant division of employees. This inappropriate grouping can do nothing more than create further problems and difficulties for both the Company and the employees concerned. It is our contention that the Board already has sufficient information before it upon which it can make a redetermination of the

class or craft, whether or not the petition of the Association for the Benefit of Non-Contract Employees is granted. This action should be taken. It is further our contention that if the Board does not feel that it has sufficient information before it, more than adequate reasons now exist for the calling of an open hearing so that these facts may be elicited.

The petitioner herewith requests that the National Mediation Board review its prior findings and denial of the petition of the Association for the Benefit of Non-Contract Employees and reverse its findings heretofore entered so that the Association for the Benefit of Non-Contract Employees, the representative of the majority of the employees in the class or craft with which the Board now intends to deal, be recognized and heard.

Respectfully submitted,

/s/ RALPH C. JOHNSON

ASSOCIATION FOR THE BENEFIT OF
NON-CONTRACT EMPLOYEES

By .....
President

Motion for Preliminary Injunction

COMES NOW, Association for the Benefit of Non-Contract Employees, plaintiff herein, by its attorneys, and moves this Court to enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, and in support thereof states:

1. Plaintiff's verified Complaint for injunction and other relief was filed herein on April 13, 1963.

2. As stated in the Affidavit of James F. Sheahan, President, filed herewith and said verified Complaint, defendants intend to hold an election among a certain group of

employees of United Air Lines before trial can be had. That said election is in violation of the statutory and constitutional rights of plaintiff's members and will irreparably damage them.

3. Plaintiff has filed herein on April 13, 1963, a Memorandum of Points and Authorities in support of this motion.

WHEREFORE, plaintiff moves the Court to enter a preliminary injunction:

(a) Restraining defendants from conducting any election under National Mediation Board case number R-3590 or certifying any representative of said employees, pursuant to said case or any other proceeding before the National Mediation Board without first conducting a hearing and permitting plaintiff to be heard as a party in interest relating to the question of the appropriateness of class or craft of employees among whom such election is to be held.

(b) Restraining defendants from conducting any election among said employees in which the form of the ballot does not permit a voting employee to cast a vote for or against representation.

Pursuant to Rule 9(b) of the Rules of this Court, plaintiff requests an order for hearing on this motion.

ARGUELLO. GIOMETTI. MCCARTHY

By ALEX L. ARGUELLO

Affidavit of James F. Sheahan

CITY AND COUNTY OF SAN FRANCISCO }
STATE OF CALIFORNIA } ss.

JAMES F. SHEAHAN, being first duly sworn, says:

That he is President of the Association for the Benefit of Non-Contract Employees, a non-profit corporation comprised of 6,400 employees of United Air Lines, said employees serving in a class or craft designated by the National Mediation Board to include "clerical, office, stores, fleet and passenger service". The total group numbers about 12,300 employees.

The Association for the Benefit of Non-Contract Employees was formed to represent the interests of its employee-members before the National Mediation Board in a dispute involving the class or craft mentioned. The dispute, of which the National Mediation Board has taken cognizance under its docket number R-3590, concerns the desire of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("the Brotherhood") and the International Association of Machinists ("the IAM") individually to become the bargaining representative for this entire class or craft.

Up to this time, the IAM has represented the ramps and stores employees. The passenger service and clerical employees have had no union representation. This group of employees working under individual bargaining agreements with United Air Lines.

On January 28, 1963, with certain other representatives (28 in number) of this employee group, affiant met and discussed the case with Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, at the Board offices in Washington, D. C. At that time, an authorization card to be circulated among the employees was shown to Mr. Thompson, and his comments on it requested. He

stated that, although some surplus language appeared on the card, the paragraph containing the delegation of the employees right of representation was adequate and was sufficient to establish the Association's representatives before the Board. Said card is attached hereto as Exhibit "A".

After said meeting, the Association's organization was completed, and the cards were circulated and returned, after signature, by some 6,400 employees. At the first meeting of the Board of Directors of the Association, the purpose and intention of the Association was stated. That is to establish the association before the National Mediation Board, to seek relief from that Board in the form of a hearing to disclose the inappropriate nature of the class or craft designated; to accomplish division of the class or craft into three parts, passenger service, clerical and ramps and stores; and to secure a ballot form which includes on it a space wherein a vote for or against union representation could be cast. Broadly, these requests for relief reflect the Association's desire to express the intention of its members to assert their right to no representation.

This position is due to the inappropriate nature of the class or craft as it now exists. Created by Board decision some 15 years ago in Docket number 1706, the grouping amalgamates the interests of a number of totally unallied and unconnected classifications. Widely diverse and disparate occupations such as cleaning-woman and passenger agent or baggage handler and electronic computer technicians are contained in it. It is the feeling of the members of the Association for the Benefit of Non-Contract Employees, that no one bargaining representative can either fairly or equitably represent the interests and desires of such variegated classifications. If divided into three parts as requested by the Association, the new groups would be much more closely identifiable in function and

interest. The Association feels that a hearing before the National Mediation Board would establish the unreasonable and unwieldy nature of the class or craft as designated.

To accomplish these purposes, the Association on February 12, 1963, petitioned the Board for the relief described above. The Board on March 27, 1963, denied the Association's petition as to all requests.

The grounds of the denial were that the authorization cards used by the Association for the Benefit of Non-Contract Employees did not authorize it to bargain collectively, that the Association for the Benefit of Non-Contract Employees did not seek a ballot place, and did not intend to bargain collectively.

Affiant avers that the Board of Directors of the Association for the Benefit of Non-Contract Employees has not directed or authorized any officer or representative of the Association to refuse to bargain collectively with United Air Lines or under Board procedures. On the contrary, the Association for the Benefit of Non-Contract Employees seeks to bargain for the right they desire, no representation.

The National Mediation Board has informed one of the attorneys for the Association for the Benefit of Non-Contract Employees that it is proceeding with arrangements for the holding of an election under the procedures of the Board on the 22nd day of April, 1963. Unless restrained, the Board will proceed with that election in derogation of the rights of the Association for the Benefit of Non-Contract Employee's members as set forth in detail herein.

The decision of the Board refusing to grant either status or relief to the Association for the Benefit of Non-Contract Employees is unjust and unlawful in that it denies to the majority of employees in this class or craft a fundamental

right, inherent in the Railway Labor Act and the Constitution of the United States, the corollary of right to bargain collectively, the right to not bargain collectively.

The ballot form proposed to be used by the National Mediation Board contains no space on it wherein a voted can cast a vote for no representation. On the contrary, the ballot provides only the opportunity to vote for one of the unions named. While there is a line wherein the voter could write the name of another representative or organization, the total effect of the ballot is to require the voter to vote for some representation. The only alternative that is left to the voter is to deface or destroy the ballot. It is respectfully urged that this method of action is not commensurate with the democratic processes of the United States. With such a ballot there is no method by which the voter can unequivocally vote for no representation. The absence of defacement of his ballot being possibly construed as the act of a "disinterested minority". The employee who desires not to be represented has no available method by which he can indicate to the Board his determined desire to avoid representation. The members of the Association for the Benefit of Non-Contract Employees are in this situation. By virtue of the election procedure proposed to be used by the Board these employees are being discriminated against, and are being denied their bargaining right to have no representation. Although the Association has requested that this situation be changed by the Board by the simple expedient of adding a space for a "no vote" on the ballot form the Board has refused to grant this relief.

The inference which the ballot leaves with the employee receiving the ballot is that the voter must vote for one of the unions named or for another or for a representative of his choice. The authority of the Board is to certify a representative as elected by the employees. It is not to

direct the workers to elect a union, this action places the Board in the position which exceeds its statutory authority. The Board should be restrained from holding the election until a condition is created in which the employee can assert a free choice to have no representation.

The ballot form which was adopted in 1934 by the Board does not reflect the changing and developing nature of the air lines industries. Certain areas of employees have been developed wherein large delegations of responsibility and authority now exist; highly trained technicians are used in the newly discovered fields of electronic computers. Many individuals serving in such capacities prefer to rely on individual bargaining agreements to determine their rates of pay, advancement, tenure and other emoluments. No statutory authority or constitutional bar exists with respect to the right of the worker to bargain individually if he so desires. On the contrary, the Railway Labor Act implicitly guarantees to the employee freedom of choice in his actions. The actions of the Board have effectively denied the Association's members an opportunity to exercise that freedom. If not restrained the election will succeed in designating a bargaining agent, a union, not desired but against the wishes of the majority group of employees in the craft of class.

The Board's rules declare that a majority of the votes cast in an election determines the union representative, provided a majority of the class or craft votes. The danger created by this procedure is especially applicable to the present case. Here a large number of the class or craft in a bargaining unit of approximately 12,300 employees will be compelled, in order to express their desire for no representation to refrain from voting. A number will vote. The winning union, although having a minority of votes cast would be certified by the Board. This inequity would be corrected by the addition of a "no vote" on the ballot.

In providing a space for a "no" on the ballot the Board would not be acting without precedent. Under the procedures of the National Labor Relations Act, a space for no union representation is regularly provided on the ballot form. Neither the National Labor Relations Board or the National Mediation Board are given specific directions under their statutory enactments as to the manner in which the ballot is to be prepared. However, the National Labor Relations Board has acted in a manner designed to protect the will of those employees seeking no union representation, while the National Mediation Board has refused to do so.

As mentioned, the Board also denied the Association for the Benefit of Non-Contract Employees request for a hearing to determine the appropriateness of the class or craft, and the request for a new division of the class. Affiant avers that an investigation by the Board and an open hearing would immediately expose difficulties of working with this designation made some 15 years ago. Through such a hearing the National Mediation Board would discover that as stated by the Association for the Benefit of Non-Contract Employees, a large number of the employees in this group have established valuable individual bargaining agreement. These agreements have come about after years of service and in a labor market wherein employees of great skill and technical knowledge and ability are well able to bargain individually, because of a great demand for their services. To group employees with such occupations as janitors, laborers and baggage-handlers, creates a problem which cannot be handled by a single bargaining representative. The interests, aims and purposes of these different groups require different approaches and different bargaining methods and agreements. The National Mediation Board's refusal to permit a hearing has prevented the Association for the Benefit of Non-Contract Employees from placing this evidence before it. The

Board's refusal to grant the Association status as a party in interest has prevented the Association's presenting the desires of its members for no representation. Since the Board's ruling in case number R-1706 made 15 years ago, in the very beginnings of the air line industry and upon railroad concepts, many advances in service and method have been made. Those advances have required the training and utilization of a new group of highly trained and skilled individuals. In a limited sense, these individuals constitute the heart of the modern air line. Such individuals are involved here. They desire to be heard. They desire to express their desire to vote for or against representation. The Board's unlawful action has denied them any and all relief. The National Mediation Board has denied them their statutory right to a free election and will deprive them of valuable property rights in their individual bargaining agreements without due process of law under the Fifth Amendment of the Constitution of the United States. Such damage will be irreparable.

ASSOCIATION FOR THE BENEFIT OF
NON-CONTRACT EMPLOYEES

By

/s/ JAMES F. SHEAHAN, President

Subscribed and sworn to before me this 12th day of April, 1963.

MARVIN G. GIOMETTI
Notary Public

In and for the City and County of San Francisco, State of California. (Commission Expires: 4/26/63)

EXHIBIT "A"

I hereby authorize the hereinafter named persons to act on my behalf as incorporators and directors for the purposes of finding and directing the affairs of the corporation to be known as an "Association for the Benefit of Non-Contract Employees" of which I wish to be a member.

The same individuals are hereby authorized and empowered to represent me before the National Mediation Board.

The execution of this instrument revokes any authorization heretofore made for the appointment of a representative.

.....

Motion for Temporary Restraining Order

Plaintiff, Association for the Benefit of Non-Contract Employees, hereby moves this court to issue a temporary restraining order pursuant to Fed. R. Civ. P. 65, and in support thereof states:

1. Plaintiff has filed herein on April 13, 1963, a verified Complaint for injunction and other relief; Motion for Preliminary Injunction, Affidavit of James F. Sheahan, President; and Memorandum of Points and Authorities in support of the motion.

2. Defendants have been served with summons and copies of the aforesaid documents, but the time for defendants to respond thereto has not yet elapsed.

3. As stated in the said Affidavit of James F. Sheahan, President, and in the said verified Complaint, defendants intend to hold a representation election pursuant to the Railway Labor Act § 2, 44 Stat. 577, as amended, 45 U.S.C.

§ 152, among a certain group of employees of United Air Lines, including some 6400 employees represented by plaintiff; and that defendants intend to hold such election on April 22, 1963, before trial of this action or hearing on plaintiff's Motion for Preliminary Injunction can be had.

4. As further stated in the said Affidavit of James F. Sheahan, President, and in the said verified Complaint, plaintiff petitioned to intervene as a party in interest in the proceedings before the National Mediation Board designated as Case No. R-3950 requesting a hearing as to the proper designation of the class or craft of employees subject to the election; plaintiff further petitioned that if its request for a hearing were denied that defendants provide an election ballot which would permit a voting employee to cast a vote against any representation; that said petition of plaintiff was denied by the Board in its entirety; and that the scheduled election will be in violation of the statutory and Constitutional rights of plaintiff's members and will irreparably damage them.

5. Immediate and irreparable injury, loss, and damage will result to plaintiff if defendants are permitted to conduct such election before notice can be served and a hearing had on plaintiff's Motion for Preliminary Injunction, inasmuch as plaintiff is without any administrative or judicial remedy to review defendants' illegal action in conducting the election in the manner complained of by plaintiff.

WHEREFORE, plaintiff moves the court to issue a temporary restraining order:

1. Restraining defendants from conducting any election under National Mediation Board Case No. R-3950, or certifying any representatives of said employees, pursuant to said case or any other proceeding before the National Mediation Board without first conducting a hearing and permitting plaintiff to be heard as a party in interest re-

lating to the question of the appropriateness of the class or craft of employees among whom such election is to be held; and

2. Restraining defendants from conducting any election among said employees in which the form of the ballot does not permit a voting employee to cast a vote either for or against representation.

Dated: April 18, 1963

ALEX L. ARGUELLO
244 Kearny Street
San Francisco 8, California
SUtter 1-5080

JEROME C. MUYS
Jerome C. Muys
Tower Building
Washington 5, D. C.
MEtropolitan 8-6474
Attorneys for Plaintiff

Temporary Restraining Order

This cause came on to be heard on plaintiff's verified complaint and its motion for a temporary restraining order pending hearing on plaintiff's motion for a preliminary injunction, from which it appears to the court that defendants are about to conduct a representation election under Section 2 of the Railway Labor Act, 4 Stat. 577, as amended, 45 U.S.C. § 162, on April 22, 1963, which will affect some 6400 employees represented by plaintiff as set forth in plaintiff's complaint, and will carry out such election unless restrained by order of this court. It further appears that immediate and irreparable injury, loss, and damage will result to plaintiff's members if the election is conducted before a hearing can be had on plaintiff's

motion for a preliminary injunction, in that if defendants are permitted to carry out the election in the manner complained of by plaintiff, plaintiff's members will be without any administrative or judicial remedy to review the action of the defendants, which action plaintiff contends is in excess of the defendants' statutory authority and will deprive plaintiff's members of their rights and property without due process of law.

IT IS ORDERED, therefore, that:

1. Defendants, and each of them, are hereby restrained from conducting any representation election under National Mediation Board Case No. R-3590, or certifying any representatives of the employees affected by that case; provided that (see below)

2. This order shall expire April 24, 1963 at 5:00 P.M. unless within such time the order for good cause shown is extended or unless defendants consent that it may be extended for a longer period;

3. Plaintiff's Motion for Preliminary Injunction be set down for hearing on April 24, 1963 at 10:00 A.M.; and

4. Copies of this Order be immediately served by the United States Marshal upon defendants.

Dated: April 18, 1963

/s/ G. L. HART, JR.
United States District Judge

Issued at: 2:27 P.M., April 18, 1963
/s/ G. L. HART, JR.

Plaintiff, or his agent, first file an undertaking with surety, or cash in lieu thereof, in the sum of $100.00 for payment of such costs and damages as may be incurred or suffered by any party who may be found to be wrongfully restrained or enjoined.

Opposition of Defendants to Plaintiff's Motion for Preliminary Injunction

Come now defendants by their attorneys and in opposition to plaintiff's motion for preliminary injunction submit the Affidavit of Eugene C. Thompson, Secretary of the National Mediation Board, and a memorandum in opposition, both attached hereto, and made a part hereof.

JOHN W. DOUGLAS
Assistant Attorney General
Civil Division

DONALD B. MACGUINEAS

HARLAND F. LEATHERS

RICHARD S. BEATTY
Richard S. Beatty
Attorneys, Department of Justice
Attorneys for Defendants

AFFIDAVIT

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss

EUGENE C. THOMPSON, being first duly sworn, deposes and says:

1. I am the Executive Secretary of the National Mediation Board, and as a part of my official duties have custody of the Board's files and records. I have examined the Board's files and records relating to NMB Case No. R-3590 involving representation of Clerical, Office, Stores, Fleet and Passenger Service employees of United Air Lines, Inc. (hereinafter referred to as United), and find the following information therein concerning this case.

2. On August 24, 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station

Employes (AFL-CIO), (hereinafter referred to as BRC) filed application pursuant to Section 2, Ninth, of the Railway Labor Act, amended (45 U.S.C.A. 152.9) for investigation of a representation dispute among the craft or class of employees of United "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes." As a result of preliminary examination to which all such applications are subject, the craft or class designation above stated was questioned by the Board in letter dated August 27, 1962, (copy attached marked Exhibit 1) to Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks. Mr. Harrison's explanation of the craft or class designation shown in his application was contained in letter to the Board dated August 27, 1962. (Copy attached marked Exhibit 2).

3. On August 30, 1962, United and the International Association of Machinists (hereinafter referred to as IAM) were advised of this application and requested to submit their statements in respect thereto. United was also requested to furnish the total number of employees covered by this application. (Copy attached Exhibit 3).

4. On September 7, 1962, United responded to our letter of August 30, 1962, (copy attached as Exhibit 4) stating it is the carrier's position that the BRC application involved only a part of a group of employees which the Board had found to constitute a craft or class, and it should, therefore, be dismissed. The carrier also advised they would not, at that time, furnish the number of employees involved. On September 11, 1962, the IAM replied to our letter advising that in their opinion the craft or class covered by the BRC application did not conform to the

Board's findings, particularly as set forth in NMB Case No. R-1706, et al., (copy attached affidavit as Exhibit 5).

5. The BRC, on October 5, 1962, amended its application to cover the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service employees (copy attached as Exhibit 6). After further exchange of correspondence with United and IAM, the amended application, covering the craft or class of Clerical, Office, Stores, Fleet and Passenger Service employees, as established in determination issued by this Board in Case No. R-1706, et al., dated January 31, 1947, (copy attached marked Exhibit 7) was docketed as NMB Case No. R-3590, on November 8, 1962.

6. Mediator William F. J. Klatte was assigned to conduct an investigation of this case commencing November 19, 1962. This investigation consisted of checking the authorization cards furnished by the BRC in support of their application against a list of employees furnished by the carrier for that purpose. On December 19, 1962, the National Mediation Board authorized an election be conducted among the employees involved based on Mediator's report that his investigation showed sufficient evidence to warrant finding that a representation dispute existed among these employees under the Board's rules. (Copy attached marked Exhibit 8. See Part 1206).

7. On December 19, 1962, prior to recessing this case for the holidays and to allow the Mediator to attend the Board's Annual staff meeting, the Mediator advised the officers of United that the National Mediation Board had ordered an election among the employees in question and requested a list of employees involved showing names, occupations, locations, and home mailing addresses to be ready when the Mediator returned on January 14, 1963. Upon his return on January 14, 1963, the Mediator inquired about the status of the preparation of this list, and

was informed the carrier had decided the request for this list was premature in the absence of a ruling from the Board on United's request, dated September 7, 1962, that a public hearing be held to establish the proper craft or class of employees involved in this case. The company renewed this request in letter dated January 11, 1963. (Copy attached as Exhibit 9). After consideration of this letter the Board replied under date of January 17, 1963, (copy attached as Exhibit 10) calling attention to the fact that in the Board's opinion the carrier is not, and cannot be, a party to this representation dispute. This opinion is based on the National Mediation Board's policy, formulated early in the Board's history under the 1934 amendments to the Railway Labor Act, which has been enunciated many times in our annual reports and communications to rail and air carriers subject to the Act.

8. Our letter of January 17, 1963, also denied the carrier's request for a hearing on the craft or class established under Case No. R-1706, et al., for the reason that the carrier is not, in the Board's view, a party to this dispute. The Board also called attention to the fact that no such request had been received from either party to this dispute, namely, the BRC and the IAM. On January 25, 1963, (copy attached as Exhibit 11) the carrier addressed a letter to Chairman Edwards asking the Board to reconsider its denial for a hearing contained in our letter of January 17, 1963. In executive session on January 31, 1963, the Board gave full consideration to the position of the carrier with respect to the craft or class of employees involved in this dispute, and on February 4, 1963, addressed a letter to the carrier fully outlining its reason for again denying their request for a hearing on the craft or class (copy attached as Exhibit 12).

9. On January 18, 1963, United addressed a letter (copy attached as Exhibit 13) to Board Member O'Neill taking the position the Board should use a form of ballot which

would provide a space for a vote for "no representation". The Board replied on January 24, 1963 (copy attached as Exhibit 14), advising the Board sees no reason to deviate from its customary form of ballot in the current dispute. This form of ballot has been used by the Board in over 3,400 representation elections among various crafts or classes of railroad and airline employees since 1934, among which were several elections involving other classes of United employees, at which times the company made no objection to the form of ballot such as they have now raised. On February 1, 1963, the carrier wrote Chairman Edwards (copy attached as Exhibit 15) referring to our letter of January 24, 1963, and requesting reconsideration of the decision made in our letter to the carrier of January 24, 1963, supra. This request was again given careful consideration by the Board and under date of February 7, 1963, the Board replied to the carrier (copy attached as Exhibit 16) reiterating their reasons for denying the carrier's request for a change in the form of ballot.

10. During this exchange of correspondence the Mediator was in Chicago waiting for the Carrier to furnish the list of employees which would enable him to proceed with plans for conducting the election. On February 4, 1963, the Mediator again inquired about the status or preparation of the eligible list and was advised by the carrier that the task was a large one and the list would not be completed until approximately February 11, 1963. On that date the Mediator further inquired concerning the status of the list and was advised by the Carrier's officers that they had decided to decline to prepare and furnish the list. The Carrier so notified this office by letter of same date (copy attached marked Exhibit 17). The list referred to in the second paragraph of the Carrier's letter of February 11, 1963 is the one furnished the Mediator on November 27, 1962, for checking the authorization cards submitted by the BRC in support of their application and contained only

the names, occupations and locations of the employees, but did not include the mailing addresses which would be required to conduct the election. The list containing the mailing addresses is the one which the Carrier has refused to furnish. It will be noted the Carrier advised that if the Board wished to exercise its statutory authority to make copies of revelant "books and records" of the company (Section 2, Ninth, of the Railway Labor Act, copy attached marked Exhibit 18), they would make them available to the Board's representatives at the carrier's executive offices. On February 12, 1963 the Board directed its Mediator to secure this information from the Carrier's records.

11. In several places in the Motion for a Preliminary Injunction filed by the Plaintiff; the affidavit filed by President J. F. Sheahan of ABNE; and the Memorandum of Points and Authorities filed by the Plaintiff, the statement is made that on January 28, 1963, certain representatives of the employee group known as the Association for the Rights of Non-Contract Employees (hereinafter referred to as ARNE), including Mr. Sheahan, met with the undersigned in the Board's Washington Office at which time it is stated the authorization cards that would be circulated to the employees was shown to the undersigned who was reported to have said: "the paragraph containing the delegation of the employees right of representation was adequate and was sufficient to establish the Association's representatives with the Board". This statement does not coincide with the facts of what transpired in the January 28, 1963 meeting between the undersigned and the employee committee.

The undersigned, accompanied by Assistant Executive Secretary Thomas A. Tracy, met on January 28, 1963 at 2:30 P.M., with Mr. George W. Jansen, an employee of United who acted as spokesman for the group of approximately 27 persons identifying themselves as United em-

ployees. Mr. Jansen stated he then spoke for approximately 1,200 employees of United on the West Coast and demanded the undersigned furnish him with a reply to his request for a public hearing dated January 24, 1963 which was in the form of a letter accompanied by copy of a telegram (copy attached marked Exhibit 19) received on the morning of January 28, 1963. This group included Mr. James F. Sheahan who subsequently has identified himself as the President of the Association for the Benefit of Non-Contract Employees (hereinafter referred to as ABNE). Mr. Sheahan stated he represented approximately 500 employees of United who were members of ABNE which was then being organized on the West Coast. Mr. Sheahan stated this Association was then engaged in incorporating and was circulating authorization cards among Customer Contact Employees stated by the group to be approximately 5,000 in number and further stating the employees intended to petition the Board on behalf of the Association for certain action in connection with the forthcoming election. The undersigned was unable to determine from the conversation with Messrs. Jansen, Sheahan and others whether they intended to intervene formally as a party to this dispute, or whether they intended to petition on behalf of the signatories to the authorizations for a hearing on the subject of craft or class. During the January 28, 1963 meeting a document was presented to the undersigned by Messrs. Jansen and Sheahan containing writing which they stated they intended to have printed to include on the authorization cards being circulated among United employees. This writing contained the language set forth below:

> "I hereby authorize the hereinafter named persons to act in my behalf as incorporators and directors for the purpose of forming and directing the affairs of a corporation to be known as an 'ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES' of which I shall be a member.

"These same individuals are hereby authorized and empowered to represent me before the National Mediation Board.

"The execution of this instrument revokes any authorizations heretofore made for the appointment of a representative."

The undersigned took particular pains to point out to Messrs. Jansen and Sheahan and others in the group of 27 employees that he, the undersigned, did not consider the language "These same individuals are hereby authorized and empowered to represent me before the National Mediation Board" as sufficient, under the Board's rules and regulations to secure recognition by the National Mediation Board for ARNE as an intervenor in Case R-3590 for the reason the language did not authorize ARNE to represent the signatories for the purposes of collective bargaining under the Railway Labor Act. The undersigned informed Messrs. Jansen, Sheahan and committee that although he could not speak for the Board, generally an authorization card containing an authorization to represent the signatories for the purpose of collective bargaining under the Railway Labor Act is considered by the Board as necessary to secure recognition of a petitioning organization as an intervenor under the Board's rules for the purpose of securing a place on the ballot, provided authorization from 35% of the employees in the craft or class in question are presented to the Board in support of such petition. The undersigned further endeavored to ascertain from Messrs. Jansen and Sheahan if this group intended to intervene as a party to this dispute and secure a place on the ballot as a candidate in the election. The undersigned was informed a decision on that point had not yet been reached by the employee group, and they intended to make such a decision upon their return to the West Coast and at the time the new association was to be incorporated.

The employees further asked how much time would be given them to circulate their cards and come in with a petition. The undersigned advised them he could not give a positive answer to their inquiry. They were advised, however, that the Board's mediator was at that time engaged in preparing a list of eligibles from the carrier's records which task had not yet been completed. I informed them that as a Board representative I could not promise any specific time in which they could conduct a card campaign and present their petition. They were in possession of the Board's rules and regulations governing the handling of representation disputes under the Railway Labor Act appearing in the Code of Federal Regulations, Title 29, Chapter X.

12. On February 14, 1963 Mr. James F. Sheahan, accompanied by certain other individuals stating themselves to be employees of United appeared at the Board's Washington Office and presented the undersigned with a letter bearing the date of February 11, 1963, addressed to Chairman Edwards of the National Mediation Board. This letter incorporated a petition to the National Mediation Board for certain action which is described therein. (Copy attached marked as Exhibit 20) That letter stated the ABNE, as of that date, represented 5,100 employees in the Customer Contact and Office Clerical groups of United, evidenced by signed authorization cards from each of said employees. Mr. Sheahan brought with him a bag containing these cards which were displayed to the undersigned but not turned over to him at that time for the reason the employee committee stated they wished to take them back and have certain records made therefrom for their files after which action the cards would be presented to the Board as evidence supporting the petition. On February 25, 1963 Mr. Sheahan wrote the Board stating ABNE was still actively campaigning for membership and to date had in excess of 6,000 signed authorization cards from non-

contract employees. This letter stated that upon completion of the IBM tally the remainder of the cards would be forwarded to the Board. Subsequently the cards were brought to the Board's office by Mr. Richard Harrell, the Washington representative of the ABNE's Board of Directors. Copy of Mr. Sheahan's letter of February 25, 1963 together with copy of the attachment metioned therein is attached marked Exhibit 21, the postscript of which reads as follows:

> "P.S. Perhaps to answer some unasked questions, these points should be made clear:
>
> 1. We are not seeking recognition as a bargaining agent; we do not want our name on the ballot.
>
> 2. We have no intention of becoming a Company union.
>
> 3. We are not sanctioned, recognized, or assisted in any way by United Air Lines management.
>
> 4. Our Association will be dissolved after such time as it has served its purpose."

Additional cards were presented by Mr. Harrell and all cards are presently being held in the Board's offices. The ABNE has stated they have presented a total of approximately 6,400 cards. No attempt has been made by the Board to verify this number or to check the signatures on the cards against the eligible list which has been prepared by the mediator for the reasons which are fully explained in Board's letter of March 27, 1963 denying the February 11, 1963 petition of the ABNE. (Copy of which is attached to Mr. Sheahan's affidavit marked as Exhibit B).

13. On April 3, 1963 Mr. Sheahan addressed a letter to Chairman Edwards of this Board requesting reconsideration of the denial of February 11, 1963 petition made in the Board's letter of March 27, 1963. Copy of this letter is attached to complaint filed by the plaintiff marked Ex-

hibit C. This letter was considered by the Board in executive session on April 11, 1963 at which time action was taken denying the April 3, 1963 request for reconsideration. Advice of this denial was given to the attorney for ABNE in telegram dated April 12, 1963. (Copy attached marked Exhibit 22).

14. Section 2, Second of the Railway Labor Act reads:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

An authorization to represent employees before the Mediation Board by a group which states that it does not wish to be on the ballot is not considered a claim to be a representative for collective bargaining under the Railway Labor Act. The sole function of the National Mediation Board in handling representation disputes under Section 2, Ninth is to act as a referee between the contesting parties to determine who is the representative and to certify such representative in writing to the carrier.

15. A copy of the ballot to be used in this election is attached marked Exhibit 23. This form of ballot was first authorized by the U.S. Railroad Labor Board in its Decision No. 218, dated July 26, 1921 (Copy attached marked Exhibit 24). The ballot was later revised by the U.S. Railroad Labor Board in its Decision No. 418, dated November 19, 1921, by omitting identifying information (Copy attached marked Exhibit 25). Following creation of the National Mediation Board on June 21, 1934, the Board on August 4, 1934, formulated and approved rules for conducting representation elections. The ballot sanctioned by this action is attached marked Exhibit 26. The Board

authorized a modification in this ballot effective July 1, 1956, copy of which is attached marked Exhibit 27.

16. The Board has given careful consideration to whether or not a hearing is required for the purpose of determining the composition of the craft or class, and has concluded for the reasons stated in the February 4, 1963 letter to Mr. Mason, Exhibit 12, that there is no necessity for holding such a hearing for the purpose of an election in this dispute.

17. The Board does not issue a certification after a representation election has been held unless a majority of those eligible to participate in the election have cast valid ballots. A valid ballot is one that is marked to indicate that the voter desires to be represented by one of the contesting organizations, or by a representative designated by the voter in the space provided on the ballot. If a ballot is blank, or is marked by the voter to indicate he does not desire representation, it is not counted as a valid ballot, in determining that a majority of those eligible have participated in the election.

18. The certification is issued by the Board in compliance with its duty under Section 2, Ninth, of the Act to certify the duly designated and authorized representatives of the employees in the craft or class with whom the carrier shall treat for the purposes of the Act. A sample form of certification is attached as Exhibit 28. Wages, rules and working conditions are not established by a certification. The certification merely authorizes an employee representative to bargain. Thereafter, conditions of employment become a product of the collective bargaining process.

19. Because of the unique circumstances in a few cases (R-2783, C-2252 and C-2389) the Board exercised its discretionary authority in relation to the craft or class and authorized a vote among Stock Clerks as the most effective way to implement the purposes of the Act. In subsequent

cases, the full craft or class of Clerical, Office, Stores, Fleet and Passenger Service employees as set forth in Case No. R-1706, et al. was used in elections held under Cases R-2953, R-3013, R-3048, R-3105, R-3119, R-3165, R-3191, R-3222, R-3256, R-3278, R-3307, R-3347, R-3365, R-3399, R-3416, R-3488, R-3535 and R-3555.

20. The Board's records on Case R-3590 show this case has been under active handling by the Board since August 27, 1962 and a dispute was found to exist among the craft or class of employees involved on December 19, 1962. The Board's mediators have spent approximately three months in preparing a list of the eligible employees from the carrier's records due to the refusal of the carrier to furnish that information to the mediators. The eligible list has now been completed and agreed to by the contesting organizations, namely the BRC and the IAM. The notice of election and ballots have been printed and the mediator is now in the process of preparing the ballots for mailing to the eligible employees. Any further delay at this time would nullify much of the effort expended by the Board to conduct an election.

E. C. THOMPSON
E. C. Thompson,
Executive Secretary
NATIONAL MEDIATION BOARD

Subscribed and sworn to before me
this 22nd day of April, 1963.

WILLIAM B. BINSWANGER

(SEAL)

Exhibit 1

August 27, 1962

Mr. George M. Harrison
Grand President
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes
Brotherhood of Railway Clerks Building
Cincinnati 2, Ohio

Dear Mr. Harrison:

This will acknowledge your letter dated August 24, 1962, attaching representation application covering "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes," employees of United Air Lines, Inc.

We observe from the craft description that stores employees represented as of August 24, 1962, by the International Association of Machinists, and fleet service employees represented by the same Association as of the same date, are excluded from the application.

Please advise us of the significance of the date contained therein. Is it the position of your organization that employees hired in the excluded categories after August 24, 1962, would be covered by the application?

Very truly yours,

E. C. THOMPSON
Executive Secretary

Exhibit 2

GRAND LODGE
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
BROTHERHOOD OF RAILWAY CLERKS BUILDING
CINCINNATI 2, OHIO

Geo. M. Harrison
Grand President

File 230-449-7

Subject: Organization—United Air Lines, Inc.

August 27, 1962

Air Mail
Mr. E. C. Thompson, Exec. Secy. (2)
National Mediation Board
Washington 25, D. C.

Dear Sir:

Please be referred to my letter of August 24, 1962, requesting the services of the National Mediation Board, under Section 2, Ninth, of the Railway Labor Act, as amended, for the purpose of securing certification as to who is the representative designated and authorized, in accordance with the requirements of the Act, of the following craft or class of employes of United Air Lines, Inc.:

> Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes.

It is our position that all employes of United Air Lines, Inc., who were formerly in the employ of Capital Airlines in the craft or class for which our Organization was certi-

fied by the National Mediation Board as the collective bargaining agent, shall be given the right to vote in any secret ballot conducted by the National Mediation Board for the following reasons:

1. In Interpretation No. 93, Case No. A-6037, the National Mediation Board found:

> "* * *, this Board is of the opinion that the language of Article 1(b) of the agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambiguous. In other words, the language means just what it says and we so find."

2. The agreement between the Brotherhood of Railway Clerks and Capital Airlines has an effective date of August 3, 1959, and provides in Article 44 that it "shall continue in full force and effect until February 1, 1962, and thereafter unless thirty (30) days written notice is served by either party signatory hereto, as provided in the Railway Labor Act, amended." Neither Capital prior to the effectuation of the merger with United, nor United subsequent to the merger, has served a notice upon our Organization in accordance with the provisions of the Railway Labor Act, as amended, as provided for in Article 44 of the agreement between our Organization and Capital Airlines, mentioned above.

3. Article 3, paragraph (a), of the above-mentioned agreement between Capital Airlines, Inc., and the Brotherhood of Railway Clerks establishes the seniority districts of the employes of Capital in the craft or class commonly known as clerical, office, stores, fleet and passenger service employes. Seniority District No. 1, as provided by Article 3, paragraph (a), of that agreement, is composed of "General Offices and Stores." Employes engaged in the performance of Stores work held seniority on a systemwide clerical roster, known as Seniority District No. 1, Roster,

covering all General Office and Stores Department employes. Thus the employes engaged in the occupations on that seniority roster for Seniority District No. 1 held seniority which was valid for exercising rights to all positions engaged in the performance of General Office work as well as all clerical positions in the Stores Department not represented by the I.A.M. on United.

4. Article 3, paragraph (a), of the above-mentioned agreement between Capital Airlines, Inc., and the Brotherhood of Railway Clerks establishes the seniority districts of the employes of Capital in the craft or class commonly known as clerical, office, stores, fleet and passenger service employes. Seniority District No. 2, as provided by Article 3, paragraph (a), of that agreement, is composed of "All Field Stations." Employes engaged in the performance of fleet service held seniority on a systemwide clerical roster, known as Seniority District No. 2 Roster, covering Cargo, Operations, Reservations, Ticketing, Sales, etc. Thus, the employes engaged in the occupations on that seniority roster for Seniority District No. 2 held seniority which was valid for exercising rights to all positions engaged in the performance of work of Operations, Ticketing, Reservations, Sales, etc., which are not represented by I.A.M. on United, in addition to the positions engaged in the work of Cargo Handling and Cabin Service which are represented by the I.A.M. on United.

5. The Civil Aeronautics Board, in Docket 11699, issued Order No. E-16605—In the matter of the UNITED-CAPITAL MERGER CASE—which provided in Item 2, paragraph (c), as follows:

> "That, except as noted below, United shall be subject to the labor protective provisions set forth in the appendix to this order."

Section 3 of Appendix A—Labor Protective Provisions—to the Civil Aeronautics Board's order, reads as follows:

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected.
> * * * *"

This provision requires the retention of all seniority rights for Capital employes under our agreement with that corporation.

By operation of our agreement with Capital Airlines, which provides in Article 1(b) that "all provisions of this agreement shall be binding upon the successors and assigns of the company," and which the National Mediation Board in its Interpretation No. 93, Case No. A-6037, has found that "the language means just what it says and we so find," and by reason of the provisions of Section 3 of Appendix A—Labor Protective Provisions—In the matter of the UNITED-CAPITAL MERGER CASE—Civil Aeronautics Board's Order No. E-16605—which provides that the seniority rights of Capital Airlines' employes shall be dealt with in an equitable manner, the seniority rights of the former Capital employes now in the employ of United, who occupied positions with Capital in Seniority Districts Nos. 1 and 2, mentioned above, and which extended to positions in occupations not now represented by the I.A.M. on United, should entitle them to vote in the determination of the representative for collective bargaining purposes for the employes occupying positions to which their seniority is valid and not now represented by any other organization.

The former Capital employes occupying positions now represented by the I.A.M. on United are, in effect, in a

furloughed status with regard to all positions to which their seniority was valid under our agreement with Capital and are now represented by the I.A.M. Since the former Capital employes in that status have a valid claim to the exercise of their seniority to some positions in the craft or class (as limited) designated in our request for certification by the Board as the collective bargaining representative on United, such employes have a valid right to cast a ballot to determine such representative. It is requested that the Board permit such employes to participate in the vote.

Very truly yours,

GEO. M. HARRISON
Grand President

Exhibit 3

August 30, 1962

Mr. Charles M. Mason
Senior Vice President Personnel
United Air Lines, Inc.,
P. O. Box 8800
O'Hara International Airport
Chicago 66, Illinois

Mr. A. J. Hayes
International President
International Association of Machinists
New Machinists Building
1300 Connecticut Avenue, N. W.,
Washington, D. C.

Gentlemen:

We have an application from the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, to investigate a representation dispute under the provisions of Section 2, Ninth, of the Railway

Labor Act among the following employees of the United Air Lines, Inc.

> Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes.

A copy of Mr. Harrison's letter to the Board, dated August 27, 1962, setting forth additional information pertaining to this application is attached for each of you gentlemen.

Mr. Mason is requested to furnish total number of employees covered by this application, along with any statement he may care to make.

Since the IAM is the current representative for stores and fleet service employees, Mr. Hayes is requested to submit any statement he may care to make with respect to this application.

Very truly yours,

E. C. THOMPSON
Executive Secretary

6:ec cc: Mr. George M. Harrison

Exhibit 4

UNITED AIR LINES
1200 ALGONQUIN ROAD, ELK GROVE TOWNSHIP, ILLINOIS
Mailing Address: P. O. Box 8800, Chicago 66, Illinois
Telephone 625-1400
EXECUTIVE OFFICES

September 7, 1962

Mr. E. C. Thompson
National Mediation Board
1230 Sixteenth Street, N. W.
Washington 25, D. C.

Dear Sir:

We acknowledge receipt of your letter of August 30 in which you advise United Air Lines that the National Mediation Board has received an application from the Brotherhood of Railway and Steamship Clerks to investigate a representation dispute under the provisions of Section 2-Ninth of the Railway Labor Act among the following employees of the United Air Lines, Inc.:

> "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes."

Since the Brotherhood's application excludes certain employees represented as of August 24, 1962 by the International Association of Machinists, the application is inconsistent with the National Mediation Board's determination of craft or class in Case No. R-1706 et al. The application, therefore, is for a group of employees smaller than the craft or class which the Board has found to exist in the airline and industry.

As United has previously advised the Board on a number of occasions, it is our long established policy and practice

to treat only with a labor organization certified by the National Mediation Board pursuant to the Railway Labor Act which requires certification of a duly authorized representative for an entire craft or class. The files of the National Mediation Board will show that United Air Lines voluntarily recognized the International Association of Machinists as the collective bargaining representative of ramp and stores employees in 1948. At the time of this voluntary recognition United supplied the Mediation Board the evidence upon which this recognition was based and the reasons why an exception was being made to its established policy. The National Mediation Board replied, reminding United and the International Association of Machinists that this voluntary recogniztion did not preclude a subsequent determination by the National Mediation Board of the proper craft or class to which the employees would belong.

It is United's position, therefore, that since the Brotherhood's application requests investigation of a representation dispute involving only a part of a group of employees which the Board has found to constitute a craft or class, it should be dismissed. In the event the Board does not see fit to dismiss the Brotherhood's application, the Board should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board in these previous cases. Only in this manner can the processing of this application result in the certification to United Air Lines of a duly authorized representative of its employees with which United will be legally obligated to bargain. In making this reply, United does not at this time take any position as to the extent of the proper craft or class of its employees who may be involved in the Brotherhood's application.

In view of United's position as stated above, we will not at this time furnish the total number of employees or our position on the Brotherhood of Railway and Steamship

Clerks' contention with respect to the eligibility to vote of employees formerly represented by it on Capital Airlines who are now represented by the International Association of Machinists on United Air Lines.

Since the Board's decision if it does not dismiss the Brotherhood's application will vitally affect the existing representation of certain employees by the International Association of Machinists, we are sending a copy of this letter to Mr. Hayes for his information

Sincerely,

CHARLES M. MASON
Charles M. Mason
Senior Vice President
Personnel

cc: Mr. George M. Harrison
Mr. A. J. Hayes

Exhibit 5

INTERNATIONAL ASSOCIATION OF MACHINISTS
1300 CONNECTICUT AVE. WASHINGTON 6, D. C.

OFFICE OF THE
INTERNATIONAL PRESIDENT

49-United

September 11, 1962

Subj: United Air Lines, Inc.—
Application Representation
Dispute filed by BRC

Mr. E. C. Thompson
Executive Secretary
National Mediation Board
Washington 25, D. C.

Dear Mr. Thompson:

This will acknowledge the receipt of your letter dated August 30, 1962 wherein you advise of the application filed

by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, to investigate a representation dispute involving certain employees of United Air Lines, Inc. You also enclosed a copy of Grand President George M. Harrison's letter dated August 27th setting forth the position of the BRC with respect to this application.

In reviewing this entire matter, including the information contained in Mr. Harrison's letter of August 27th, it is our considered opinion that the craft or class of employees as requested by the BRC does not conform to the findings of your Board, particularly with reference to the craft or class determination as set forth in Case R-1706, et al.

Respectfully yours,

A. J. HAYES
A. J. Hayes
International President

H/FH/ac
cc: Reeves

Exhibit 6

GRAND LODGE
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
BROTHERHOOD OF RAILWAY CLERKS BUILDING
CINCINNATI 2, OHIO

Geo. M. Harrison,
Grand President

File 230-449-7

Subject: Organization—United Air Lines

October 5, 1962

Mr. E. C. Thompson, Exec. Secy. (2)
National Mediation Board
Washington 25, D. C.

Dear Sir:

This will acknowledge receipt of your letter of September 13 with regard to our application dated August 24, 1962, for investigation of a representation dispute among certain employes of United Air Lines, Inc. You attached to your letter a copy of one addressed to the Board, dated September 11, 1962, by Mr. A. J. Hayes, International President, International Association of Machinists, commenting upon our request. You were correct in your statement that Mr. Charles M. Mason, Senior Vice President, Personnel, United Air Lines, had furnished me a copy of his letter of September 7, 1962, addressed to the Board, commenting upon our request for the Board's services. It should be noted that a copy of Mr. Mason's letter was also furnished to Mr. Hayes.

Under the Railway Labor Act, an employer is not entitled to participate in a representation dispute, and, therefore, the Board may not take cognizance of Mr. Mason's comment concerning the appropriateness of the

craft or class as defined in my request for the Board's services dated August 24, 1962.

It is noted that Mr. Hayes is collaborating with the management of United Air Lines by also raising the question as to the appropriateness of the craft or class as defined in my letter to the Board dated August 24, 1962. In the last paragraph of Mr. Hayes' letter, he says: "it is our considered opinion that the craft or class of employes as requested by the BRC does not conform to the findings of your Board, particularly with reference to the craft or class determination as set forth in Case R-1706, et al."

Mr. Hayes indicates that the Board furnished him copies of my letters of August 24, 1962, and August 27, 1962, addressed to the Board. It is presumed that since the Board furnished him copies of those two letters, that it also furnished Mr. Hayes a copy of my letter of August 29, 1962. In each of those three letters I made it clear that it was not the intent of our Organization to include in the craft or class description for which we had requested the Board's services in the investigation of the representation dispute any employe of United Air Lines, Inc., subject to an agreement in existence prior to August 24, 1962, the date on which I requested the services of the Board.

The only inference to be drawn from Mr. Hayes' statement, as quoted above from his letter to the Board dated September 11, is that he is of the opinion that our request for the Board's services in this dispute should have included as well the employes in occupations covered by the agreements between the International Association of Machinists and United Air Lines. I am, therefore, hereby advising the Board of my desire to amend the statement of the craft or class as set out in my request for the Board's services under date of August 24. Please substitute for the description of the craft or class for which the services of the Board are requested, the following:

Commonly known as clerical, office, stores, fleet and passenger service employes.

The National Mediation Board is urged to process our request of August 24, 1962, as amended herein, without further delay.

Very truly yours,

GEO. M. HARRISON
Grand President

Exhibit 9

UNITED AIR LINES

1200 ALGONQUIN ROAD, ELK GROVE TOWNSHIP, ILLINOIS

Mailing Address: P. O. Box 8800, Chicago 66, Illinois
Telephone: 625-1400

Executive Offices

January 11, 1963

Mr. E. C. Thompson
Executive Secretary
National Mediation Board,
1230 Sixteenth Street, N. W.
Washington 25, D. C.

Re: *NMB Case No. R-3590*

Dear Mr. Thompson:

Mediator Klatte has requested certain information from United for the purpose of holding an election in reference case. We believe his request is premature in the absence of a ruling from the Mediation Board on the request of United made September 7, 1962 that a public hearing be held to establish the proper crafts and classes on United. We hereby renew our request that such a public hearing be held and set forth herein at some length the reasons necessitating a hearing.

We wish to point out to the Board that the group of employees covered in the representation application filed in the above case does not coincide, either in its original or amended form, with any currently applicable craft or class determination. Further, there are distinguishing features between the members of the heterogeneous group of employees involved in this application which the Board has not had the opportunity to fully consider in any prior proceeding. At a public hearing, the Board will learn of the wide variances in the training, skills and responsibilities of the employees, of the absence of cross-training and cross-utilization between them, and of the absence of a community of interest, for example, between the highly skilled office employees and the janitorial and cleaning employees. The lack of unanimity in the air transport industry in general and on United in particular with reference to the organization of operations, the selection, training, use, representation and lack of permanency in respect to these factors in this dynamic and rapidly changing industry can and should be considered by the Board.

In 1946, in R-1706, the Mediation Board was asked to establish for the first time on an airline a craft or class grouping of employees ranging from what the Board referred to as janitors and laborers to the highest type of technical office employees. The Board attempted in that case to establish a mold to apply to all airlines in the future. Since most of the employees in this heterogeneous grouping were unorganized at the time in the air transport industry, the Board was forced to treat with the important subject of craft or class in somewhat of a vacuum with the "hope" that its prospective determination would provide a basis for stable labor relations in the *future* on *airlines* only because such a craft had been found to provide such a basis in the *past* on *railroads*. Although the Board did avoid a multiplicity of crafts or classes by its determination in R-1706, the Board simply did not have knowledge at the time of its decision (January 31, 1947)

of the changes that would and did later occur in the air transport industry.

The BRC contended during the public hearing in R-1706 that because the Railway Labor Act was amended to cover airlines, the same craft or class treatment on rail lines should be followed by the Board on airlines. Although this specific contention was not accepted by the Board, the Board nevertheless found a craft or class of airline employees that was the counterpart of the railroad craft or class of clerical, office, station and storehouse employees. The IAM, on the other hand, requested a separate craft or class of ramp service and stores employees. This view was rejected by the Board as was the IAM's later request for a reconsideration of the Board's findings:

Although the IAM's request for a reconsideration of the R-1706 findings was denied by the Board in 1947, the Board then stated that its denial did *not* prevent a re-examination of craft or class as applied to these categories of employees in *any* future airline representation disputes. This position was taken in 1947, as the Board later explained in R-2783, in "recognition of the fact that the airline industry was still in a state of development," and further, "that the clerical and related employees on many of the major air carriers were then unrepresented." Thus, the Board recognizes that the lack of representation of the bulk of these employees on many of the major air carriers is a significant factor to be taken into account in representation questions.

At the invitation of the Board, United was present at the public hearing in R-1706 and United's views on craft or class were received by the Board. Based upon its limited experience and in the interests of avoiding an unknown and possibly undesirable multiplicity of crafts or classes, United had recommended adoption of a craft or class substantially the same as the one adopted by the Board.

As early as September 20, 1949, however, United Air Lines advised the National Mediation Board that developments in organization after R-1706 had led United to believe it may have been in error in the position it took before the Mediation Board. United advised the Board that the organizational development by 1949 among the employees on United after R-1706 and changes in United's own operational organization were such that the Board's determination in R-1706 had become impractical both from the employee's point of view and the carrier's.

In 1951, in a matter concerning the proper craft or class grouping of equipment service men, stock clerks or janitors of Northwest Airlines in R-2357, the National Mediation Board accepted the Statement of United Air Lines. In its Statement, United advised the Board that United had definitely concluded, in light of its experience, that the Board's determination in R-1706 did not provide for a proper craft or class for the air transport industry.

In R-2357, decided February 22, 1953, the Board stated that arguments advanced for reconsideration of the proper groupings of the various occupational classifications of employees which may comprise the craft or class of clerical, office, stores, fleet and passenger service employees impressed the Board as having considerable merit. The Board announced in R-2357 that in view of the lapse of five years after R-1706 and because of the "expansion and growth of the airline industry" as well as the "development of representation of airline employees," *the Board was then of the opinion that upon proper application, it would be advisable to re-examine the determination in R-1706, with a view of making such modifications as might be found to be justified at the time in question.*

In R-2783, decided February 16, 1954, in a case concerning a request by the IAM to represent stores employees of Northwest Airlines separately from the broad clerical group included in R-1706, the Board did examine its R-

1706 findings. While it did not re-examine the entire craft or class, the Board concluded that stores employees are a separate craft or class for the purposes of the Railway Labor Act.

In C-2252 and C-2389, decided November 9, 1956, in companion cases relating to the request of the IAM to separate stores employees of Trans-Texas Airways and North Central Airlines from the existing clerical groupings, the Board again re-examined R-1706 findings with reference to stores employees. In so doing, the Board noted that by that time (1956) the representation of the entire clerical craft as outlined in R-1706 showed that such craft was *not* represented as a single unit on any air carriers except six.

The Board went on to say that its records showed that stock and stores employees were organized and covered by collective bargaining agreements on 24 air carriers, independently of the craft as designated in R-1706. United was included by the Board as one of the Board's 24 examples where stock and stores employees were represented as a separate unit by the same organization representing airline mechanics on those carriers. On the basis of evidence presented at the *hearing* and the development of representation among stock and stores employees, the Board concluded that the general purpose of the Railway Labor Act would be more readily achieved and the general duties as specified in Section 2 of the Act would be more readily accomplished by a determination that stock and stores employees are considered separate crafts or classes of employees. The Board's conclusion was reached only after a public hearing.

Inasmuch as United knows of no findings of the Mediation Board subsequent to Cases C-2252 and C-2389 reestablishing the stores employees as a part of the clerical and related group covered by R-1706, it can only be considered now that the R-1706 findings are no longer controlling. It should be noted that the amended application of the

BRC in the current case is based on the now obsolete R-1706 findings.

The importance that the Board's craft or class determinations have in settling of disputes and the promotion of stable labor relations has been clearly recognized by the National Mediation Board. As a necessary corollary, the Board's determination may well disrupt instead of promote stable labor relations and encourage rather than settle disputes among employees. The Board's class or craft determinations have, of course, a demonstrable impact upon the organization structure and operating efficiency of an air carrier.

The Board itself has recognized that it therefore should review and even revise its class or craft determinations with respect to airline employees after a public hearing, and has done so. In R-1447, for example, the Board altered the craft or class of airline mechanics. In R-2357, the Board concluded that R-1706 should be re-examined and in R-2783, C-2252 and C-2389, it concluded that stores employees are no longer properly grouped with the various other components in what had been a craft or class of clerical, office, stores, fleet and passenger service employees as determined in R-1706. Also, and as recently as 1961, the Board, in C-2946, made a drastic change in the grouping of flight deck crew members of the United Air Lines.

As a result of the findings of the National Mediation Board Committee in C-2946, decided January 17, 1961, in the matter of representation of employees of the *United Air Lines, Incorporated—Flight Deck Crew Members*, the Board conducted an election on the basis of a single craft or class in face of a long history of collective bargaining of two separate crafts or classes which had existed not only on United but on a majority of the major air carriers. C-2946 is significant in several respects. In the first place, the Committee found, among other things, that—

> "The airline industry, as distinguished from the railroads, is still in the formative stage and in a period

of expansion, with strong prospects of further technological change. The difference between the railroads and the airline industries affects the application of craft or class principles and criteria with the result that the determination made herein may not be considered, as such, applicable to the railroads."

Further, as pointed out in C-2946, "When governmental participation in the determination of craft and class issues occurred in the railway and air transportation industries, the two branches were in entirely different stages of maturity" and that there is no "high degree of crystallization in craft and class lines" in the "comparatively new air carrier industry" that the years have brought on the railroads. The teaching of C-2946 is that the Board is not necessarily bound by past craft or class groupings; on the contrary, the Board will take a fresh look at crafts or classes in the air transport industry.

Congress has imposed upon United Air Lines, as a scheduled air carrier, the obligation to follow the declaration of national policy to provide "economical and efficient service by air carriers at reasonable charges." United Air Lines is also under the statutory command of the Railway Labor Act to treat "in a proper case" with the representative of its employees as certified by the Board for a craft or class determined by the Board. Because of the impact that the grouping of employees into crafts or classes can have upon an air carrier's organization and operation, it is necessary that the Board establish a craft or class or revise one only after the fullest hearing and after obtaining the views of all concerned—including the carrier. The carrier is obviously in the best position to furnish evidence to the Board on the effect that craft or class groupings may have on interruptions of its service to the public. For example, the Committee appointed by the Board in C-2946 requested information from United before making the important craft or class determination

which had such a dramatic effect upon the entire air transport industry that the President of the United States and the Secretary of Labor intervened.

The inappropriateness of the Board's R-1706 findings of 1947 have been apparent for some time not only to United but to others, as pointed out above. The Board itself, as noted, recognized that the R-1706 findings are no longer appropriate. The fact that 16 years have elapsed since the R-1706 findings and there still is no representation of the clerical and related employees on many of the major air carriers renders R-1706 even more obsolete. United has enlarged to where it is the largest domestic scheduled air carrier. Thus, any craft or class determination made in 1947 for another airline on the prospect of future employee representation, which has never occurred, cannot properly be applied 16 years later to the organizational and operational structure of United. A determination of what craft or class groupings are now appropriate should only be made after a public hearing.

In summary, United Air Lines believes a public hearing is not only appropriate, but necessary to serve the public interest for the following reasons:

The Board's determination in R-1706—issued sixteen years ago—was not based upon actual airline experience and history, but was carried over from the railroads. Whether it would become suitable for the airlines had to be left for future developments.

Experience in the airline industry since 1947 has demonstrated that the Board's determination in R-1706 has not been suitable for the airlines, as witnessed by the fact that the Board itself has reexamined and departed from its R-1706 determination in various subsequent cases (R-2783, C-2389, C-2487), and the organization of employees on major air carriers has not conformed to the R-1706 findings.

United's own experience over the sixteen-year period which has elapsed since R-1706, during which time there has been a substantial growth and evolution in the Company, clearly establish the inappropriateness of R-1706 to present day conditions.

The carrier's ability to operate efficiently and to have stability in labor relations would be severely hampered by imposition of the now obsolete determination on United since R-1706 lumps together heterogeneous groups of skilled and unsiklled employees in a manner wholly inappropriate to the Company's present organizational structure.

The Board, as noted above, has committed itself to take a fresh look in a public hearing at the appropriateness of a craft or class when appropriateness is questioned in light of changed conditions.

Based upon United's study and experience, as well as observations in the industry, United believes that the groups of employees under discussion probably logically separate into three large crafts or classes. At the Board's hearing, United will be prepared to supply the Board with full historical and present facts upon which the Board can judge the propriety of what is proper under all the facts.

Sincerely yours,

S/C. M. Mason
T/C. M. Mason
Senior Vice President-Personnel

cc: Mr. George Harrison
Mr. A. J. Hayes
Mediator Klatte

Exhibit 10

NATIONAL MEDIATION BOARD
WASHINGTON

January 17, 1963

NMB Case No. R-3590

Mr. Charles M. Mason, Sr. Vice President
United Air Lines, Incorporated
P. O. Box 8800
Chicago 66, Illinois

Dear Mr. Mason:

Acknowledgment is made of your letter of January 11, 1963 in re NMB Case No. R-3590. You state you believe the request made by Mediator Klatte for certain information from United Air Lines, for the purpose of holding an election in this case, is premature in the absence of a ruling from the National Mediation Board on the request of United Air Lines dated September 7, 1962 that a public hearing be held to establish the proper crafts or classes on United Air Lines.

Reference to your letter of September 7, 1962 shows the specific request you made was as follows:

> "It is United's position, therefore, that since the Brotherhood's application requests investigation of a representation dispute involving only a part of a group of employees which the Board has found to constitute a craft or class, it should be dismissed. In the event the Board does not see fit to dismiss the Brotherhood's application, the Board should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board in these previous cases."

The application filed by the Brotherhood of Railway & Steamship Clerks on August 24, 1962 was not dismissed, and was subsequently amended to cover the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service Employes. You were so advised by copy of Mr. Harrison's letter of October 5, 1962 transmitted with copy of our letter to Mr. Harrison dated October 8, 1962.

In our letter of October 24, 1962, addressed to you and President Hayes of the International Association of Machinists, we inquired whether you were in a position to furnish the number of employes in this craft or class as requested in the last paragraph of our letter of October 8, 1962. On November 2, 1962 you replied and stated "the records of United Air Lines indicate there is a total of 12,451 employes as of October 15, 1962 in such craft as we understand it". You further stated this figure did not include 339 employes classified as Lead Janitors, Janitors or Cleaning Women as of October 15, 1962. Your letter of November 2, 1962 indicated a clear understanding of what is meant by the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service Employees as referred to in the Board's determination issued in NMB Case No. R-1706, et al.

The various comments made in the remainder of your letter of January 11, 1963 have been given careful consideration by the Board. The Board wishes to call your attention, first, to the fact that the carrier is not a party to this representation dispute. Secondly, no request for a review of the craft or class established by the Board's determination in Case No. R-1706, et al has been received from either organization party to NMB Case No. R-3590. The request contained in your letter of January 11, 1963 is not timely made, since the Board, on December 19, 1962, found that a representation dispute existed among the employees in this craft or class, and has authorized an election.

For the above reasons, the Board must deny your request of January 11, 1963 for a public hearing on the subject of a review of the determination made in Case No. R-1706, et al.

It is, therefore, requested that you furnish promptly to Mediator Klatte the necessary information regarding the employees of United Air Lines, Inc. in the craft or class at issue, so he may proceed with plans to hold an election among these employees. Your cooperation in furnishing this information promptly to Mediator Klatte will be appreciated.

By direction of the NATIONAL MEDIATION BOARD.

E. C. THOMPSON
Executive Secretary

cc-to: Mr. G. M. Harrison
Mr. A. J. Hayes
Mr. W. F. J. Klatte

Exhibit 11

UNITED AIR LINES
1200 ALGONQUIN ROAD, ELK GROVE TOWNSHIP, ILLINOIS
Mailing Address: P. O. Box 8800, Chicago 66, Illinois
Telephone 625-1400

EXCUTIVE OFFICES

January 25, 1963

Mr. Leverett Edwards
Chairman
National Mediation Board
Washington 25, D. C.

Dear Mr. Edwards:

Acknowledgment is made of the Board's reply dated January 17, 1963 to United's letter of January 11, 1963. The Board in its reply denies United's request that the Board

hold a public hearing to establish the proper crafts and classes on United.

The purpose of this letter is to protest the Board's refusal and to ask that the Board reconsider United's request. In support of our request for reconsideration, I wish to supplement my letter of January 11, 1963.

We in United are astonished that the Board would make a decision vitally affecting 12,700 employees and which will have a long lasting and adverse effect upon the operating efficiency and economy of United without obtaining the views of everyone concerned. The Board's denial of United's request indicates that the Board is somehow prohibited from obtaining or considering United's views on the craft or class question on the ground that United is not a party to this representation dispute. This is indeed strange since on a number of occasions the Board has specifically invited United to express its views at public hearings on the question of what constitutes a proper craft or class. Indeed, both of the contesting labor organizations have at one time or another in the past complimented United for its expression of such views and have urged United to express them at subsequent public hearings.

In stating that the carrier is not a party to this representation dispute, the Board's reply attributes to United a position it has never sought and does not now seek. United is fully aware that it is not a party to any controversy over the choice of representatives by the employees; indeed, United has no desire to be such a party and recognizes the legal and proper right of the employees to choose their own representatives, if they wish one. United submits, however, that it has a legitimate interest in the scope of a craft or class. In other words, the *only* issue in which United asserts a right to be heard concerns the *scope* of the craft or class—not the identity of the representa-

tive, if any, of the employees of such craft or class in an election.

The Board's failure to recognize United's legitimate interest in the scope of a craft or class will interfere with the efficient conduct of United's business. The refusal by an administrative agency of the Federal government to afford United an opportunity to be heard at a public hearing in a matter which will so seriously affect United's ability to conduct its business is in fact a denial of due process Further, the Board, on its own initiative and in the exercise of its own discretion, should hold the requested public hearing. Any rule of the Board that a carrier does not have a status which entitles it to be heard on the breadth of a class or craft is as archaic as the railroad craft or class in which an election is proposed. The Board has a responsibility under the Railway Labor Act to work for the establishment of stable labor relations in the airline industry. As the Board well knows, a craft or class determination can have a serious and disruptive effect on interstate transportation. This was clearly shown when President Kennedy, on the day of his inauguration, had to assign the Secretary of Labor to mediate airline strikes resulting from a craft or class determination which was arrived at after lengthy public hearings stretching over many months. It cannot be said that the purposes of the Act are better served when an inappropriate craft or class determination is imposed upon over 12,000 employees without any public hearing whatsoever.

You seem to imply in your letter that United's request for a public hearing is tardy and should have been repeated at the time the Brotherhood of Railway Clerks amended its representation application. United had no way of knowing at the time the Brotherhood amended its application that an election would in fact be held. This was not known until Mediator Klatte had checked authorization cards and on approximately December 19, 1962,

advised United that the Board had authorized an election. Prior to that date, we could see no useful purpose to be served in pressing for a public hearing on the subject of how employees should be grouped for voting purposes in an election that might never be held.

You further point out that United had a clear understanding of what is meant by the clerical, office, stores, fleet and passenger service employees craft or class when, on November 2, 1962, we advised you of the total number of United employees in that craft or class. We do not understand the significance of this statement. The fact that United did advise you of the total number of employees in the group described as the craft or class did not, of course, imply that United considered that the grouping was a proper one. Our request for a public hearing was not for the purpose of being advised by the Board where the boundaries of that craft or class lie. Our request was based upon the firm belief that the Board should review its determination of craft or class in R-1706, et al, and determine, in light of the lapse of 15 years, and the other factors set out in our letter of January 11, whether the R-1706 determination was still a proper grouping.

Finally, the imposition by the Board of an inappropriate railroad craft or class upon 12,700 employees of this dynamic and changing air transportation industry is illogical. The "clerical, office, station, and storehouse employees craft or class" grew up out of the historical development of the railroad industry. To say that a craft or class springing from the history of the then static and now declining railroad industry should be forcibly imposed on the airline industry, which has an entirely different history and is still growing, is illogical and improper. If the Board restricts air carriers to railroad rigidity, United will not be able to discharge fully the obligation imposed upon it by Congress through the Federal Aviation Act to provide efficient and economical service at reasonable

charges to the public. In fact, my personal observations of the operations and organization of Capital Air Lines before Capital had to be merged into United or face bankruptcy convinced me that part of Capital's difficulties resulted from the Board's action in 1947 in forcing a vast and heterogeneuos group of employees into a single craft or class because that craft or class had been satisfactory on railroads in the past and the Board "hoped" it would be in the future on air lines.

For these reasons, we strongly urge the Board to reconsider its denial of United's request for a public hearing.

Sincerely yours,

C. M. MASON
C. M. Mason
Senior Vice President—Personnel

cc: G. M. Harrison
A. J. Hayes
W. F. Klatte

Exhibit 12

NATIONAL MEDIATION BOARD
Washington

February 4, 1963
NMB CASE No. R-3590

Mr. C. L. Mason, Sr. Vice President
United Air Lines, Incorporated
P.O. Box 8800
Chicago 66, Illinois

Dear Mr. Mason:

Acknowledgement is made of your letter of January 25, 1963 addressed to Chairman Edwards of this Board, protesting the Board's refusal to hold a public hearing on the

question of craft or class in NMB Case No. R-3590, and asking the Board reconsider United's request.

The Board, in executive session on January 31, 1963, gave very careful consideration to the various statements made in your January 25th letter. As you are aware, the two organizations which are parties to this dispute are in agreement that the craft or class of Clerical, Office, Stores, Fleet and Passenger Service employees established by the Board's findings in NMB Case No. R-1706, et al in the determination issued January 31, 1947, is the proper and appropriate grouping of these employees for the purposes of an election under Case No. R-3590.

The Board has received a number of letters and telegrams purporting to be from employees of United in this craft or class, protesting against a vote embracing the entire craft or class, and in some instances, asking that the Board include a space on the ballot for a vote for "no representation". A statement of the Board's position on these two questions has been prepared, dated January 25, 1963, copies attached. A large number of the communications referred to appear to have been inspired by your circular letter of January 14, 1963 addressed to all United Employees eligible to vote in the election under Case No. R-3590. The total number of such communications, however, represents only a small minority of the approximately 13,000 employees in the overall craft or class which you have reported. The Board is not in position to recognize these requests as justifying a hearing on craft or class in Case No. R-3590.

Your remarks concerning the carrier's interests in a craft or class determination have been given full consideration. Over the years, since the creation of the Board 1934, hundreds of determinations of craft or class have been made governing carrier employees in both the railroad and airline industries. Accommodations to the crafts or classes found appropriate by the Board have been made by the carriers concerned, when necessary, and with practically no protest.

Under all the circumstances existing in this case, the Board can see no justification to open the class or craft question on its own motion. Your request for reconsideration of the Board's decision contained in our letter of January 17, 1963 is accordingly denied.

Mediators Klatte and Pierce, who are assigned to the handling of this case, report that to date the carrier has not furnished them a list of the employees involved in this dispute. The record of this case shows that requests for this list have been made on the following dates:

December 19, 1962 by Mediator Klatte verbally to Mr. Berhoud and Mr. Hill.
January 14, 1963 by Mediator Klatte to Mr. Berthoud
January 17, 1963 in the Board's letter to you
January 21, 1963 by Mediator Klatte to Mr. Berthoud
January 28, 1963 by Mediator Klatte to Mr. Berthoud

Your attention is directed to the last sentence of Section 2, Ninth of the Railway Labor Act, reading as follows:

> "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

You are hereby requested to furnish the list of employees involved in this dispute, in the form requested by Mediator Klatte on December 19, 1962, and corrected to January 14, 1963 without further delay. Your prompt advice as to when this list may be expected will be appreciated.

By direction of the NATIONAL MEDIATION BOARD.

E. C. THOMPSON
Executive Secretary

cc-to: G. M. Harrison
A. J. Hayes
Wm. F. J. Klatte

Exhibit 13

UNITED AIR LINES

1200 Algonquin Road, Elk Grove Township, Illinois
Mailing Address: P.O. Box 8800, Chicago 66, Illinois
Telephone 625-1400
Executive Offices

January 18, 1963

Mr. Francis J. O'Neill
Chairman
National Mediation Board
Washington 25, D. C.

Dear Mr. O'Neill:

Mediator Klatte has asked whether United Air Lines will allow the National Mediation Board to hold a ballot box election on United Air Lines property at points where fifty (50) or more of United's employees involved in Case R-3590 are located.

United Air Lines is willing to allow a ballot box election on Company property provided the ballot follows the form used by the National Labor Relations Board in similar union representation elections held under the National Labor Relations Act. In other words, the ballot would have a space for the employee to vote *against* representation as well as space for the employee to vote *for* representation by the Brotherhood of Railway Clerks or the International Association of Machinists. The ballot also could provide space to vote for "any other organization or individual" or not provide such a space, as the Board might deem proper in the light of the revision of the ballot. We would also expect that the customary rules would be established and followed to insure that the election is conducted without any undue influence upon the employees eligible to vote. If the balloting is conducted in this manner, United also would be willing to have the employees vote during their working

hours in order to provide the fullest opportunity for them to express their decision.

We want to make it very clear that United Air Lines recognizes that how a representation election is conducted is the function of the National Mediation Board. We feel strongly, however, that the employees eligible to vote in the election should know all the choices available to them at the time the voting takes place and how to express their own free choice. The form of ballot customarily used by the Board in elections does not do this since it provides spaces only to vote *for* a collective bargaining representative. It does not offer any way for an employee who does not want a collective bargaining representative to express his choice to remain unrepresented.

We are, of course, aware that under the Board's rules the employees can remain unrepresented if less than 51% of the craft or class cast valid ballots in the election. In effect, however, this means that the employee expresses his choice to remain unrepresented only in a negative manner —by not voting or by invalidating his ballot in some way. Further, to the best of our knowledge, neither the Notice of Election nor any other instructions on voting issued by the Board make clear to the employees how they can indicate their desire to remain unrepresented.

We recognize that the form of ballot customarily used by the National Mediation Board was adopted by the Board in 1934, prior to the appointment of any of the Board's present members. We further understand that the Board in the past has justified the form of its ballot on the ground that the Railway Labor Act contemplates that the employees shall have some form of representation. As stated by the National Mediation Board in "Administration of the Railway Labor Act by the National Mediation Board, 1934-1957", pp. 18-19:

> "The above-quoted excerpts from the act show clearly that it was the intent of Congress in framing the 1934

> Amendments to the original Railway Labor Act of 1926, that both the carriers and employees separately designate representatives for the purpose of collective bargaining. To effectuate this mandate of the Congress, the National Mediation Board, in 1934, designed the form of ballot which has been used without material change to the present time. *This ballot was drafted to permit the employees to secure some form of representation, as contemplated in the sections of the law quoted above.* It leaves to the majority of the employees of any craft or class full freedom to determine who shall be their representative for the purposes of the act." (Emphasis supplied)

United suggests to the Board that the legislative history of the 1934 Amendments to the Railway Labor Act in no way supports the restrictive interpretation placed upon that Act in the above statement. In fact, it lends strong support to a contrary interpretation.

The House Report on H.R. 9861, i.e., the bill which was enacted into law on June 21, 1934 as the 1934 Amendments to the Railway Labor Act, states in pertinent part, as follows:

> "2. It (H.R. 9861) *provides* that employees shall be free to join any labor union of their choice *and likewise be free to refrain from joining any union if that be their desire* and forbids interference by the carrier's officers with the exercise of said rights." (Emphasis supplied) (House Report No. 1944 to accompany H.R. 9861, U. S. House of Representatives, Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 1934 at p.2.)

The bill being considered provided that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." This is exactly the same language used in Section 2, Fourth, of the Railway Labor Act as finally enacted into law. It is evident, therefore, that the House Committee believed the right of em-

ployees to refrain from collective bargaining was implicit in the language of the bill.

It is also significant that the House Committee, unike the National Mediation Board, saw nothing inherently inconsistent between the right of employees to refrain from collective bargaining and the language of Section 2 of the bill which states that one of the purposes of the Act is "to provide for the complete independence of carriers and of employees in the matter of self-organization . . ."

Further evidence that Congress did not intend to deny employees the right to refrain from engaging in collective bargaining is found in the following statement made by Commissioner Joseph P. Eastman, Federal Coordinator of Transportation and draftsman of the bill which was eventually enacted into law, in response to a question raised by Mr. Huddleston in the House Hearings on H. R. 7650:

> "MR. HUDDLESTON: Well, as I get your idea it is the purpose of this bill not to coerce organization and not necessarily to imply organization.
>
> "COMMISSIONER EASTMAN: No, it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." (Hearing, H.R. 7650, U.S. House of Representatives, Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 1934 at p.57.)

Further corroborating the foregoing evidence of legislative intent is the following statement by Senator Wagner in the Senate Hearings on S.3266 (the companion bill in the Senate to H.R. 7650) in which he defends the bill against charges that it would tend to promote large national labor organizations:

> "SENATOR WAGNER: I am very glad you (Commissioner Eastman) are bringing out these points so very clearly. * * * (I) think that is the purpose of the Act—

I think it is so expressed in language, to give the worker *a free choice to join* any union he wants, company union or *no union*, and yet they (i.e., the opponents of the bill) have insisted (that) by giving him free choice that it creates a large national union. I do not know how that conclusion is reached, but it has been broadcast, so I am very glad you are clearing that point." (Emphasis supplied) (Hearings on S. 3266, U.S. Senate, Committee on Interstate Commerce, 73d Cong., 2d Sess., 1934 at p. 12.)

Finally, there is the following comment by Senator Wagner at the Senate Hearings on S. 3266 in response to a charge made by Mr. M. W. Clement, Vice-President of the Pennsylvania Railroad Company, that the bill would have the effect of compelling employees to join a labor organization:

"SENATOR WAGNER: * * * I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not join any union or to remain unorganized.

"MR. CLEMENT: That is the way we hope they will read when they are finally amended."

As you also are aware, the form of the National Mediation Board's ballot was the subject of court review in *McNulty* v. *National Mediation Board,* 18 F. Supp. 494 (N.D.N.Y., 1936). In that case the court decided that the form of the ballot used by the National Mediation Board was improper because it did not afford the employees an opportunity to truly express their will, stating on pp. 501-02 as follows:

"It is manifest that this ballot did not present the issue to the eligible voters.

"The issue, of course, as the mediator admittedly found, was whether the men desired to continue under the individual contract method or the National Union representation.

"Concerning these two methods, the O.R.T. brief says: 'These two methods of employer-employee relationships are diametrically opposite, both in theory and practice. They have nothing in common. There can be no representation under the first method and representation is essential under the other.'

"But the employees had no opportunity to express a choice between these methods. They were in effect told that they must have representation for collective bargaining and were asked to elect between the National Union (O.R.T.) and an unknown.

"Unless the statute in question is meant to compel a majority of the employees (not an individual employee) to surrender their constitutional rights to contract for their own services, and the defendant O.R.T. does not so contend, then the ballot in question in no real sense determines whether the employees wish to retain the old method of individual bargaining or prefer to change over to collective bargaining.

"In short, the ballot is an artificial thing in no wise disclosing which method of contracting the majority wish, but merely shows that, if they must have collective bargaining, they preferred the O.R.T. to some unknown person or organization.

"It is idle to say that 'it was not necessary for the contract men to affirmatively vote their desire in order to win but merely necessary that their vote be against representation by the O.R.T.'

"Fifty employees tried to do just that by putting an x mark in the square opposite the words 'if you desire representation by any other organization or individual mark an X in the square,' but because they did not write in the name of some organization or individual as representative in collective bargaining, the votes were declared void and not counted.

"The ballot gave them no opportunity to vote against representation by the O.R.T., for their choice was limited to representation by O.R.T. or by some unknown representative."

Continuing this line of reasoning, the court stated:

> "Confronted with such a ballot, many may have feared that some militant group might want to write in the name of the president of the railroad or some obnoxious foreman, and, believing that they had to select some one to represent them in collective bargaining, rather than take such chances of an unknown representative, they voted for the known O.R.T.
>
> "How they would have voted had the real issue before them been presented by the ballot, no one knows or can know until another ballot presenting that issue is taken." (p. 502)

Having concluded that the election was unfair, the court declined to exercise its discretionary power to grant the injunctive relief requested by O.R.T., explaining as follows:

> "Shall the court by mandatory injunction compel these men to have collective bargaining when they may not want it and compel the road to treat with the O.R.T. as representative in collective bargaining in such circumstances as here exist. Clearly not, unless the court has no other alternative. . . ." (pp. 502-503)

The court found that it was not absolutely bound to enforce the certification issued by the N.M.B. under circumstances such as these where the manner of conducting the election offended the court's conscience. No appeal was taken from the decision of the trial court, and although the Supreme Court subsequently held in the *Switchmen's* case (320 U.S. 297 (1943)) that a certification by the N.M.B. is not reviewable by a Federal District Court, the *McNulty* case is still persuasive authority in support of the proposition that the form of election ballot presently used by the N.M.B. does not permit a true expression of employee sentiment.

We sincerely hope that the National Mediation Board will see its way clear to revise its election procedures so that our employees and employees of other carriers in future elections will have an opportunity to express their decision

on all of the choices that are available to them, one of which is to remain unrepresented. We will be happy to discuss this matter further at the convenience of the Board.

Very truly yours,

Charles M. Mason
Senior Vice President
Personnel

CMM: bg
cc: G. M. Harrison
A. J. Hayes
W. F. Klatte

Exhibit 14

NATIONAL MEDIATION BOARD
Washington

January 24, 1963
NMB Case No. R-3590

Mr. Charles M. Mason, Sr., Vice President
United Air Lines, Incorporated
P. O. Box 8800
Chicago 66, Illinois

Dear Mr. Mason:

Further reference is made to your letter of January 18, 1963 on the general subject of the form of ballot used by the National Mediation Board in conducting employee representation elections under Section 2, Ninth of the Railway Labor Act.

As you have been previously advised, the Board has consistently held, a carrier is not a party to a representation dispute involving the selection of a representative of its employees. However, the Board welcomes the expression of your views and will give you a summary of its practices and rules in the matter of holding representation elections

which have been developed as the best and most practicable procedures to insure that such elections will be fair and free from interference, influence and coercion.

As you state in your letter, the form of ballot presently used was adopted by the Board in 1934 and has been used since that time as the form best designed to ascertain the representation desires of a carrier's employees for the purpose of collective bargaining. The blank line appearing on the present form of ballot affords an opportunity to the voter to vote for some organization or individual other than those named on the ballot, or he may refrain from voting at all if he so chooses. There is no compulsion that he vote for a contestant for representation. Introduction of a "yes" or "no" ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees for the purposes described in Section 2, First and Second of the Railway Labor Act, which are quoted below for ready reference:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> "Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The Board has reviewed your reference to the case of McNulty vs. National Mediation Board 18 F. Supp. 494 (N.D.N.Y., 1936) contained on pages 4, 5 and 6 of your

letter. Your quotation from the decision of the District Court omits reference to the fact the National Mediation Board was removed as a party to this case during the Court proceedings. The Judge's opinion contained the following statement not quoted in your letter:

> "The National Mediation Board not being a party to this suit, the Court can make no order directly affecting that Board. ***** The conclusion then is that no party is entitled to affirmative relief. The complaint and the cross complaints are all dismissed without cost to any party against any other party."

It will be observed that the decision of the Court in the *McNulty* case in no way ordered discontinuance of the form of ballot customarily used by this Board. Since the Board's certification in that case was not set aside, the comment of the Court on the form of ballot must be regarded as *obiter dictum*. The *McNulty* case has never been considered by the National Mediation Board as controlling the Board's functions or practices under the Railway Labor Act.

In light of the above, this Board sees no reason to deviate from its customary form of ballot in the current dispute, and it will be used by the mediator in conducting the election in NMB Case No. R-3590.

By direction of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

cc-to: Mr. G. M. Harrison
Mr. A. J. Hayes
Mr. Wm. F. J. Klatte

Exhibit 15

UNITED AIR LINES

1200 Algonquin Road, Elk Grove Township, Illinois.
Mailing Address: P.O. Box 8800, Chicago 66, Illinois
Telephone 625-1400
Executive Offices

February 1, 1963

Mr. Leverett Edwards
Chairman
National Mediation Board
Washington, D. C.

Dear Mr. Edwards:

We have the Board's letter of January 24, NMB Case No. R-3590, in reply to our letter of January 18 on the form of ballot being used by the National Mediation Board. We appreciate the Board's furnishing us with a summary of its practices in holding representation elections.

We understand your letter to say that if the Board used a ballot that allows employees to express a desire to remain unrepresented, this would somehow circumvent a mandate of Congress that employees shall be represented. In short, employees must be represented by a union or other organization or individual. In other words, it has been the view of the Board that the purposes of the Act would be defeated by carriers treating separately with individual employees and that therefore employees are not given freedom to express a choice in a Mediation Board election between being represented or remaining unrepresented. Rather, the Board has limited employee voting to a determination of who shall be designated as the representative of the employees in the appropriate class or craft—and not whether there shall be any representative at all. Please advise us if this does not correctly reflect the Board's policies and practices.

We appreciate that the Board's position stems from the adoption of the present form of ballot in 1934, well before the appointment of the present members of the Board. We think, however, that the present Board should re-examine its position to see whether it is based upon a proper interpretation of the Railway Labor Act in light of the facts in this case. Stated in another way, irrespective of the type of ballot used by the Board in other elections, the facts of this election justify Mediation Board action to use a ballot which gives employees an opportunity to indicate whether they do or do not want union representation. In the forthcoming election, there are approximately 9,700 employees eligible to vote who are not now and never have been represented by a labor organization. These employees, together with 3,000 of our organized employees, will be eligible to participate in the largest single airline employee representation election ever held by the National Mediation Board since the airlines were placed under the Railway Labor Act.

The Board has said that in instances where the employees are not represented, the representation dispute is between the employees who desire representation on the one hand and the employees who do not desire representation or who are indifferent on the other. As the Board stated in its Twenty-Seventh Annual Report, p. 37:

> ". . . in a dispute where employees are seeking to designate a representative for the first time the dispute is between those who favor having a representative as opposed to those who are indifferent or are opposed to having a representative for the purpose of the act."

Especially in this case, where such a large number of presently unrepresented employees are involved in the election, it seems entirely appropriate that such employees have an opportunity to indicate a desire to maintain their present status. Contrariwise, it seems entirely improper that the employees who may not want to be represented or

who are indifferent—whom the Board recognizes as one of the parties in a representation dispute among unorganized employees—should be offered an election procedure which fails to provide a way to express a choice to remain unrepresented.

The Board's present form of ballot concerns United because it may thwart the desire of the majority of an unrepresented craft or class to remain unrepresented, if that is their desire. The purpose of the Act to promote stable labor relations will not be effectuated by forcing an unwilling majority of employees in a craft or class to have their rates of pay and working conditions established through a process they do not want. A contrary result may well be reached.

Section 2, Fourth, of the Railway Labor Act is the section of the Act which relates directly and specifically to the employees' right to organize and bargain collectively. It provides that:

> "Employees shall have the *right* to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." (Emphasis supplied.)

The Board's election procedure clearly recognizes the right of a majority of a craft or class to organize and bargain collectively if it chooses to exercise that right. There is, however, a large gap between recognizing the existence of a right and making the exercise of that right a mandatory requirement—which is in effect what the Board's voting procedures do. In fact, compelling employees to organize and bargain collectively effectively abridges the employees' right granted them in Section 2, Fourth. A right is no longer a right when one is compelled to exercise it but is transformed into a duty. Such a transformation obviously is contrary to the language of the Act and the Congres-

sional intent. Section 2, Fourth, properly leaves the initiative in determining whether to organize and bargain collectively to the majority of the employees of the craft or class. That initiative is improperly removed from the employees by election procedures which assume—prior to an election—that the choice available to them is only a choice between representatives.

The provisions of the Railway Labor Act upon which the Board bases its election policy and practices do not sustain the Board's interpretation. The Board's conclusion that there is a "mandate of Congress" that representatives be designated by employees apparently is based on Section 2, First and Second, quoted in the Board's letter. Section 2, First and Second, however, do not deal with the question of whether employees shall be represented or, if they do, how they designate their representative. This function is performed by Section 2, Fourth, of the Act, which, as we have already shown, clearly contemplates that the employees themselves can choose whether or not they want to be represented. Section 2, Ninth, which empowers the Board to establish its election procedures, merely gives to the Board authority to provide the proper mechanics to determine whether the majority of the employees desire to exercise the right to organize and bargain collectively guaranteed to them by Section 2, Fourth. In other words, the Board's election procedures cannot properly exceed the scope of Section 2, Fourth, and compel organization contrary to the wishes of the majority.

If the Congress intended that the Railway Labor Act require employees to be represented, that mandate would have appeared in Section 2, Fourth, of the Act, which is specifically concerned with the matter of employee organization and representation. It would be extremely unlikely that a matter so important as a Congressional mandate that employees shall be represented would be found by implication in a section of the Act which does not by its

language even refer to the matter of representation. The language of Section 2, Second, also relied on by the Board, is easily reconcilable with the recognition of a right by employees to deal with a carrier as individuals rather than through collective bargaining representatives. Obviously, Section 2, Second, which provides that "All disputes between a carrier . . . and its employees . . . shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute" becomes applicable only after the employees and the carrier have designated and authorized representatives. When employees deal with a carrier as individuals, the conference procedure contemplated by Section 2, Second, is simply inapplicable. This is shown by the testimony before the House Committee on Interstate and Foreign Commerce of Commissioner Eastman, draftsman of the 1934 Amendments to the Railway Labor Act. Commissioner Eastman stated that it was not the purpose of the bill which was eventually enacted into law to coerce organization or to require collective bargaining on the part of the employees. Rather, as Commissioner Eastman stated:

> "If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be."

The legislative history of the 1934 Amendments to the Railway Labor Act shows conclusively the Board's present procedures are in direct conflict with the intent of the Congress. It was for that reason that we made several references to the legislative history in our letter of January 18. We know that the Members of the National Mediation Board like the members of any other administrative agency, would not wish to continue a policy which is in conflict with the intent of Congress in the law under which the agency is established and operates. We would, therefore, appreciate

the Board's comments on this history since this point was not answered in the Board reply to United dated January 24.

The Board's reply to our letter of January 18 notes that the *McNulty* Case did not order discontinuance of the form of ballot customarily used by the Mediation Board since the Mediation Board was removed as a party to this case during the court proceedings. We did not cite the *McNulty* Case as support for the proposition that the Board was ordered by the court to stop using its customary ballot. Our point in raising the *McNulty* Case, which we believe is clear from our letter, is that the court in the *McNulty* Case recognized that the form of election ballot presently used by the National Mediation Board does not permit a true expression of employee sentiment. In fact, the court in the *McNulty* Case considered and rejected the interpretation of the Railway Labor Act that the employees must have representation for collective bargaining. Thus, the court stated:

> "The issue, of course, as the mediator admittedly found, was whether the men desired to continue under the individual contract method or the National Union representation.
>
> •••
>
> "But the employees had no opportunity to express a choice between these methods. They were in effect told that they must have representation for collective bargaining and were asked to elect between the National Union (O.R.T.) and an unknown.
>
> •••
>
> "In short, the ballot is an artificial thing in no wise disclosing which method of contracting the majority wish, but merely shows that, if they must have collective bargaining, they preferred the O.R.T. to some unknown person or organization."

The fact that the National Mediation was, by consent of the parties, dismissed from the suit as a party defendant does not erase the fact that the Board's form of ballot was

found by the court to be improper because it did not afford the employees an opportunity to truly express their will.

The balloting policies of the Mediation Board are in striking contrast to those followed by the National Labor Relations Board. The thrust of these sister statutes—the Railway Labor Act and the National Labor Relations Act—has been judicially found to be the same. The National Labor Relations Board, however, has adopted a form of election ballot which gives to employees the right to express their choice as to whether they do or do not want representation. On the other hand, the National Mediation Board has adopted a form of election ballot which effectively denies the employees that right. The completely contrary election procedures used under these companion laws cannot be reconciled.

United Air Lines renews the pleas of Mr. W. A. Patterson's letter of January 22 to the Board. The Mediation Board is urged to review its election procedures with the Attorney General of the United States and the Secretary of Labor to determine whether the Board's present policy and practices are consistent with the intent of Congress and the national labor policy.

Sincerely yours,

/s/CHARLES M. MASON
Charles M. Mason
Senior Vice President—Personnel

cc: Honorable Robert F. Kennedy
Attorney General
Honorable W. Willard Wirtz
Secretary of Labor

Exhibit 16

NATIONAL MEDIATION BOARD
Washington

February 7, 1963
Case No. R-3590

Mr. Charles M. Mason
Senior Vice President
United Air Lines, Incorporated
P. O. Box 8800
Chicago 66, Illinois

Dear Mr. Mason:

Acknowledgement is made of your letter of February 1, 1963, to Chairman Edwards, on the subject of NMB Case No. R-3590.

The Board sees no useful purpose to be served by continuing the exchange of correspondence concerning the views of United Air Lines, Inc. on the various aspects of the handling of this case. We will, however, comment briefly on two points made in your letter. As stated in our letter of January 24, 1963, it is the Board's view that the Congress intended that the purposes of the Railway Labor Act, expressed in Section 2(1), General Purposes, and Section 2, First and Second, should be effectuated through collective bargaining between carriers and their employees, through duly designated and authorized representatives. Decisions of the United States Supreme Court support this view.

In its Decision No. 324, October term 1936, in the case of the Virginian Railway Company vs. System Federation No. 40, Railway Employees Department of the American Federation of Labor, etc., et al., the Court said, referring to Section 2, Third, of the Railway Labor Act:

> "Under the last mentioned provision this court held, in the *Railway Clerks* case, supra that employees were free to organize and make choice of their representatives without the 'coercive interference' and 'pressure'

of a company union organized and maintained by the employer; *and that the statute protected the freedom of choice of representatives, which was an essential part of the statutory scheme,* with a legal sanction which it was the duty of courts to enforce by appropriate decree." (Emphasis supplied)

In the same decision, the Court stated:

"Petitioner argues that the phrase 'treat with' must be the equivalent of 'treat' in its intransitive sense, as meaning 'regard' or 'act towards' so that compliance with its mandate requires the employer 'to meet with the authorized representative of the employees only if and when he shall elect to negotiate with them'. This suggestion disregards the words of the section *and ignores the plain purpose made manifest throughout the numerous provisions of the Act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee.*" (Emphasis supplied)

Again, in the Supreme Court's Decision No. 112 and 1023, 1940 term, March 4, 1942, in the case of Williams, etc., et al. vs. Jacksonville Terminal Company; Pickett, etc. vs. Union Terminal Company, the Court said:

"The object of the Act is to avoid interruption to commerce through *the promotion of free association among employees for the purposes of settling disputes between them and the carriers* ***** These additions (Section 2, Seventh, and Section 6) *point squarely to limiting the bargaining provisions of the Railway Labor Act to collective action.*" (Emphasis supplied)

On Page 2 of your letter you state:

"The Board's present form of ballot concerns United because it may thwart the desire of the majority of an unrepresented craft or class to remain unrepresented, if that is their desire. The purpose of the Act to promote stable labor relations will not be effectuated by forcing an unwilling majority of employees in a craft or class to have their rates of pay and working condi-

tions established through a process they do not want. A contrary result may well be reached."

You apparently do not have a clear understanding of the Board's election procedures. Succinctly state, they are: to have a valid election under Section 2, Ninth of the Act, a majority of the employees in the craft or class must cast valid ballots, i.e., ballots for a recognizable organization or an individual not an officer of the carrier. In such a situation, a majority of the valid ballots cast will elect a representative. If no organization or individual receives a clear majority of valid ballots cast, or if less than a majority of eligibles cast valid ballots, there is no election. In the event a majority of eligibles cast valid ballots, and votes are cast for three or more organizations or individuals, and no one receives a majority of the total valid ballots cast, Rule 1206.1 of the Board's rules applies. The situation of "forcing an unwilling majority, etc." is not possible under the above rules and procedures.

The comments on the *McNulty* case made in our letter of January 24, 1963, need not be restated here.

The laws governing this Board and the National Labor Relations Board differ in many respects. The form of ballot used by the NLRB is adapted to the law under which that agency operates. The same applies to the ballot used by the National Mediation Board. We wish to remind you that this Board is an independent agency in the Executive Branch of the Government reporting directly to the Congress. Consultations such as suggested in the last paragraph of your letter are neither necessary nor appropriate.

The Board will proceed with an election among the employees concerned in NMB Case No. R-3590, under the Board's usual policies and procedures in such cases.

By direction of the NATIONAL MEDIATION BOARD.

E. C. THOMPSON
Executive Secretary

Exhibit 17

UNITED AIR LINES

1200 Algonquin Road, Elk Grove Township, Illinois
Mailing Address: P.O. Box 8800, Chicago 66, Illinois
Telephone 625-1400
Executive Offices

February 11, 1963

Mr. E. C. Thompson
Executive Secretary
National Mediation Board
Washington, D. C.

Dear Mr. Thompson:

We acknowledge receipt of your letters dated February 4 and February 7, 1963, denying United's request that a public hearing be held in Case R-3590 to permit submission of evidence to the National Mediation Board, upon which the Board could base a determination of the proper grouping of employees for purposes of a representation election, and denying our request to change the form of ballot used by the Board.

You stated that United has not furnised the Mediator a list of employees involved and request that United prepare and furnish such a list. We cannot agree with this statement because United did furnish a list of employees to the Mediator on November 27, 1962. A subsequent request for an additional list was also made by the Mediator and, to date, that request has not been complied with.

We believe the Board's refusal to permit United to be a party and to hold a hearing is a denial of the minimal constitutional requirements of due process. We, therefore, plan to institute legal proceedings seeking an appropriate court order requiring the Board to provide for a proper hearing and to change the form of ballot in Case R-3590.

Pending the outcome of such litigation, United respectfully declines to prepare and furnish the additional list re-

quested. If, in the meantime, the Board wishes to exercise its statutory authority to make copies of relevant "books and records" of the Company, we will make them available to the Board's representative at our Executive Offices.

Very truly yours,

/s/ C. M. MASON
C. M. Mason
Senior Vice President—Personnel

cc: Mr. G. M. Harrison
Mr. A. J. Hayes
Mr. W. F. J. Klatte
Hon. Robert F. Kennedy, Attorney General
Hon. W. Willard Wirtz, Secretary of Labor

Exhibit 19

January 24, 1963

E. C. Thompson
Executive Secretary
National Mediation Board
1230 - 16th St., N. W.
Washington 25, D. C.

Dear Mr. Thompson:

This letter is to confirm our telegram to you of January 23, 1963 requesting an open hearing on the craft or class determination for representation Case R-3590. A copy of our telegram is enclosed herewith. We are taking the liberty of forwarding a copy of the letter and enclosed telegram to Mr. W. A. Patterson, President of UNITED AIR LINES, and Senator Warren G. Magnuson.

Since sending the telegram we have contacted or been contacted by groups of employees of UNITED AIR LINES in Los Angeles, San Francisco, Portland, Salt Lake City, Boise, and can state that their feelings are identical as ours

on this issue. We are speaking for over 1,200 people on the West Coast alone.

Today we were informed by the San Francisco employees that they have been contacted by Customer Service employees in other cities on the UAL system including Salt Lake City, Denver, Kansas City, Chicago, Detroit, Philadelphia, Omaha and Pittsburgh, who expressed an identical view.

We earnestly repeat our request for an open hearing where we can make a detailed presentation of the reasons why it would be unreasonable and undemocratic to have an election with the voting class or craft including such different elements and interests as the one presently being proposed.

Very truly yours,
/s/ GEORGE W. JANSEN
Instructor Passenger Service

GWJ: jm
att.
cc: W. A. Patterson, President UAL
Senator Warren G. Magnuson

956P PST JAN 23 63
SEATTLE WASH 23

E. C. THOMPSON
EXECUTIVE SECRETARY
NATIONAL MEDIATION BOARD
1230 SIXTEENTH ST NORTHWEST WASH DC

DEAR SIR:

THE UNDERSIGNED SPEAKING FOR THEMSELVES AND FOR 170 OTHER EMPLOYEES IN THE CUSTOMER CONTACT CLASSIFICATION OF UNITED AIR LINES IN THE SEATTLE AREA, HEREBY FORMALLY REQUEST THAT THE NATIONAL MEDIATION BOARD HOLD OPEN HEARINGS TO DETERMINE THE PROPER CLASS/OR CRAFT FOR REPRESENTATION CASE R-3590. THE UNDERSIGNED, ED., BELIEVE ON ACTUAL INFORMATION THAT THEY EXPRESS THE WISHES OF HUNDRED OF UNITED AIR LINES EMPLOYEES IN SIMILAR EMPLOYMENT CATEGORIES IN OTHER CITIES. THE UNDERSIGNED BELIEVE THAT CUSTOMER SERVICE EMPLOYEES CONSTITUTE A DISTINCT CRAFT OR CLASS IN UNITED AIR LINES'

SYSTEM, AND STRONGLY BELIEVE THAT THEY SHOULD NOT BE REPRESENTED BY THE SAME BARGAINING AGENT THAT SPEAKS FOR SUCH TOTALLY DIFFERENT TYPES OF PERSONNEL AS RAMP, AND STORES EMPLOYEES.

PLEASE ADDRESS YOUR RULING ON THIS DEMAND FOR HEARING TO THE UNDERSIGNED, CARE OF GEORGE W. JANSEN AT 2807 - 31ST AVENUE, SEATTLE 99, WASHINGTON. WE UNDERSTAND THAT UNDER THE RULES AND REGULATION OF THE N.M.B. NO OTHER FORMALITIES ARE REQUIRED OF A PARTY TO A REPRESENTATION CASE TO INVOKE A HEARING OTHER THAN A WRITTEN REQUEST SUCH AS THIS TELEGRAM. IF YOU PRESCRIBE ANY ADDITIONAL FORMALITIES TO BRING ABOUT A HEARING, WE ASK YOU TO ADVISE US WHAT THEY ARE AT YOUR EARLIEST CONVENIENCE AND WE WILL PROMPTLY COMPLY.

GEORGE W. JANSEN
INSTRUCTOR PASSENGER SERVICE

SAM N. KONTOS
AGENT, PASSENGER SERVICE

DICK WHITNEY
AGENT, RESERVATIONS

Exhibit 20

February 11, 1963

Mr. Leverett Edwards, Chairman
National Mediation Board
Washington 25, D. C.

Re: Case R-3590

Association For The Benefit
of Non-Contract Employees

Dear Sir:

We submit herewith on behalf of the Association For the Benefit of Non-Contract Employees and the five undersigned individuals a Petition for Relief before the National Mediation Board as follows:

1. The petitioners herein and the Association For The Benefit of Non-Contract Employees, as of this date, represent 5100 employees, in the Customer Contact and office

and clerical group, of United Air Lines. This representation is evidenced by signed representation cards from each of said employees.

2. The petitioners hereby apply for leave to intervene in National Mediation Board Representation Case R-3590, as a party in interest on behalf of the 5100 employees who have appointed the petitioners. In addition to being granted permission to intervene, the undersigned do further request the following specific action from the National Mediation Board.

(a) That the pending election in case R-3590 be deferred until there be a re-determination of the class or craft of employees to be involved in the election.

(b) That the National Mediation Board, basing its action on information already before it, make a re-determination of the employees presently in the bargaining unit into three groups comprised of:

1. Office and clerical employees.

2. Customer contact employees.

3. Ramp and stores employees.

each of which should be determined to be a separate class or craft for purposes of this representation case and for future representation proceedings involving these employees.

(c) In the event that insufficient facts are presently on file or if the Board declines to re-determine the class and craft on its own motion, the undersigned hereby petition the National Mediation Board to fix a time and place for a hearing, at which petitioners and all interested parties and persons may present evidence, argument and authorities bearing on that issue; and that on the evidence thus presented, the National Mediation Board re-determine the class and craft as requested.

(d) In addition to the foregoing and notwithstanding the ultimate determination of class and craft of the National Mediation Board in Case R-3590 petitioners hereby request the National Mediation Board to prepare and use in this representation election, a form of ballot which provides on its face, a place for employees to vote affirmatively that there be no bargaining agent elected to represent their class or craft. This request is based on National Mediation Board practice of using ballots which provide the voter only the opportunity of choosing between bargaining agents.

(e) In the event that the National Mediation Board declines to use a ballot as requested, (i.e. a ballot providing a place for a "no-union" vote), then petitioners request the Board to issue a statement to petitioners, in advance of the election, explaining how a voter may register as his choice that no union be certified to represent him.

3. The request for re-determination of the class and craft is based upon numerous reasons, including the following, each of which will be proved by petitioners with appropriate evidence and authority in the event of a hearing. (1) The class and craft heretofore established by the National Mediation Board for this election includes approximately 12,500 employees of United Air Lines in widely different job categories. There is no history of collective bargaining common to these diverse groups. In fact, one group (ramps and stores) is presently unionized, while the others (customer contact and office and clerical) have never been unionized in the system. (2) Determination of customer contact and office and clerical employees to be separate classes and crafts is easily accomplished because they are readily identifiable units under both company personnel procedures and nature of work performed. (3) The National Mediation Board determination in R-1706, January 31, 1947 was prior to the significant post war operational developments of the airlines industries. These developments show that office and clerical, ramp and stores employees and cus-

tomer contact employees are separate classes and crafts and should be treated as such. (4) The employees in these classes and crafts do not desire to be joined in one bargaining unit. (5) There is widely different job-training in the different job categories. (6) The nature of their work is significantly different. (7) There is no aspect of interchangeability of personnel between the different job classifications. (8) Vital interests of each category prevents fair representation of all three groups by one bargaining agent without a serious conflict of interest or a potential conflict of interest.

Copies of this petition are being sent to the Brotherhood of Railway Clerks, International Association of Machinists and United Air Lines. It is requested that all communications regarding this petition be sent to the undersigned in care of the Association For the Benefit on Non-Contract Employees, 244 Kearny Street, San Francisco, California.

Respectfully submitted,

/s/ James K. Lamona
/s/ Ralph C. Johnson
/s/ Phyllis Ruffner
/s/ Patricia S. Leahy
/s/ Helen M. Crisman

Association For The Benefit
of Non-Contract Employees

By
/s/ James F. Sheahan
President (SEAL)

Exhibit 21

San Jose 29, California
February 25, 1963

Mr. E. C. Thompson
Executive Secretary
National Mediation Board
Washington 25, D. C.

Dear Mr. Thompson:

Attached is a letter from the Association for the Benefit of Non-Contract Employees that has been directed to all Senators and the Representatives who have evidenced an interest in our case (R-3590). We sincerely believe that our cause is just, and of course are seeking aid from many sources. I feel it only fair that you have a copy of the letter so that if any questions are directed to your office, you will have the proper background.

Mr. Tracy, I believe, had asked at our last meeting for the address of the company that processed our IBM run. It is, Data Computing Corporation, 105 Montgomery Street, San Francisco, California, Attn: Mr. Wright. We are still actively campaigning for memberships, and to date have in excess of 6,000 signed cards from non-contract employees. We hope to be able to complete our IBM tally by the end of this week; upon completion, the remainder of our petition cards will be forwarded to you.

I would also like to take this opportunity, in behalf of myself and the officers and directors, to thank you most sincerely for your kind reception at our meeting of February 14. Considering the time in which we had to obtain the required membership percentage, your patience is most appreciated.

I believe that you have been in contact these past few weeks with Mr. Richard Harrell, our Washington member of the Association's Board of Directors, and I am request-

ing by copy of this letter that he keep you informed as to our activities and progress. However, if you should need any further information from our West Coast headquarters, please do not hesitate to call or wire collect to my home address; or you may call or wire collect to Mr. Ralph Johnson, 1221A Laguna Avenue, Burlington, California; DI 3-2393 (Area Code 415).

Thank you again, sir, for your time and assistance.

Sincerely,
JAMES F. SHEAHAN, *President*

February 23, 1963

The Honorable
Office Building
Washington 25, D.C.

Dear

As you are undoubtedly aware, the Brotherhood of Railway Clerks has filed a petition (Case R-3590) before the National Mediation Board, seeking to represent some 12,700 employees of United Air Lines as their bargaining agent.

Most of the employees became aware of the petition as the result of a letter sent to all employees by by Mr. C. M. Mason, Senior Vice-President of Personnel of United Airlines, On January 15, 1963.

For the majority of us, especially among the 9,700 not now under contract, the petition came as a complete surprise. To date, at least 60% of this non-contract group have indicated that they do not wish to be represented by a labor union; but the rules by which the potential election will be held deny us the right to say we do not want union representation.

Employees scattered throughout United's 28,000 mile system began to protest individually to the NMB, to members of Congress, and to various Government agencies. Replies were directed to these same employees, stating that their

individual protests did not prove that a majority did not wish representation. Through trial and error; through efforts to seek information from sources that could not, or would not, give us the help we needed; through efforts of individual employees, we ultimately began to learn a little more about the situation facing us. Finally, some employees of our Seattle office solicited aid from Mr. Thomas Pelly of the First Congressional District of Washington. Mr. Pelly arranged a meeting with Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, on January 28, 1963, so that we might find out what to do in order to legally intervene in the case. Twenty-nine employees from various stations of United Airlines' system attended this interview. Mr. Thompson, in effect, stated that in order to protest before the Board we had to represent at least 35% of the eligible electorate; the twenty-nine employees represented only themselves. With this information, we returned to our stations; and on our own time, and at our own expense, we sought a way to unify the many employees into a cohesive unit and thus be able to rightfully intervene in Case R-3590.

Our concerted effort began on January 29. On January 31, the group incorporated in San Francisco under the laws of the State of California; the organization is known as the Association for the Benefit of Non-Contract Employees (ABNE), and represents the unorganized clerical and customer contact personnel. With the advent of the corporation, petition cards were drawn up, printed, and dispensed throughout our system. Within two and one-half weeks, our membership numbered 5,500. The figure increases each day; we expect to reach a membership of 7,000.

When the membership numbered 5,500, or nearly 45% of the total electorate, the officers of the corporation, accompanied by legal counsel, went to Washington. On February 14, 1963, we presented to the National Mediation Board a formal petition for relief. Mr. Thompson accepted the petition on behalf of the Board members, and advised us that the petition would be reviewed when the Board next met. As of this writing, a decision is still pending.

It has been stated before that we are not anti-union and this holds true. We are non-union in belief; there is a vast difference in meaning. Unions today are necessary, but they are necessary only within certain areas of the labor population. Most of us have had college training, some have been trained in specialized schools, and all have had extensive on-the-job training. We are frankly proud of our jobs and our ability to perform in them. It means more to us to be recognized on our merit, incentive, and initiative than it does to achieve our progress solely on the basis of longevity.

For this reason, the Association was formed: we wish to remain unorganized. In our petition placed before the NMB, we are seeking an open hearing wherein a separation of three classes and crafts can be properly determined within the confines of United Airlines company structure:

1. Customer Service or Public Contact (unorganized)
2. Office and Clerical (also unorganized)
3. Ramp and Stores (organized under the IAM)

The hundreds of jobs performed by employees in these three categories are in no way related; job classifications range from technical computer programmers to cabin cleaners. They are very rarely interchangeable, and it is inconceivable that all could and would be grouped into one bargaining unit. Yet the laws of the National Railway Labor Act state that these groups are related and properly classified.

The Association is also petitioning for a "No Union" vote to be placed on the NMB ballot. The ballot used does not provide for a "No" vote; it merely provides the voter a choice of unions. There is no way for him to state that he does not wish to be represented. The only way a voter can vote "No" is to destroy his ballot; to throw it away. This is a negative action, at best. This in itself is undemocratic as it denies us our constitutionally guaranteed right to protest.

The laws of the National Railway Labor Act that guide the decisions of the Mediation Board are obsolete. They were enacted 30 years ago for an industry that bears no resemblance whatsoever to the airline industry, other than that both are public passenger carriers. In almost 30 years of interpreting these laws and handing down decisions, the NMB, as a quasi-judicial body, has seldom, if ever, been challenged in a ruling.

The Association for the Benefit of Non-Contract Employees is attempting to establish a precedent, and we deeply believe that our efforts, and our cause, are justifiable. The technological advances in our industry over the past 30 years, as in all industries, defy comparison. We cannot be so indifferent as to fail to protest these laws remaining as once constituted, and yet still applying to society as we know it today. Even management has recognized these changes, and has acknowledged its responsibility to the employee by consistently improving working conditions and increasing benefits—even among the non-contract employees.

United Airlines personnel are among the highest paid in the industry within our job classifications; we enjoy among the best of fringe benefits. How can one believe that collective bargaining would benefit the United employees, when our company, in this respect, is one of the leaders in the industry?

We are in need of, and actively seek your assistance.

Perhaps through your intervention can our voices be heard. We wish to effectively perform our duties as we have been taught to do them and be recognized for our efforts as individuals. If United Airlines, as one voice in this great and dynamic industry, is drowned in the sea of bargaining disputes it will have a telling effect on the entire industry for years to come. Do you wish to see the air transportation industry decline as we have seen the railroad and maritime industries decline? We sincerely hope not.

Your consideration and assistance will be deeply and gratefully appreciated.

Sincerely and Respectfully,

/s/ JAMES F. SHEAHAN
James F. Sheahan, President
Association for the Benefit
of Non-Contract Employees

JFS/hc

P.S. Perhaps to answer some unasked questions, these points should be made clear:

1. We are not seeking recognition as a bargaining agent; we do not want our name on the ballot.
2. We have no intention of becoming a Company union.
3. We are not sanctioned, recognized, or assisted in any way by United Airlines management.
4. Our Association will be dissolved after such time as it has served its purpose.

Exhibit 22

PD F-MD NATIONAL MEDIATION BOARD 3:43 p.m. 4-12-63

ALEX ARGUELLO
KEIL BUILDING
244 KEARNY STREET
SAN FRANCISCO, CALIFORNIA

BOARD HAS TODAY CAREFULLY CONSIDERED LETTER DATED APRIL 3, 1963, SIGNED BY JAMES F. SHEAHAN AND OTHERS ADDRESSED TO CHAIRMAN EDWARDS RE CASE R-3590, REQUESTING RECONSIDERATION OF BOARD DECISION DATED MARCH 27, 1963, DENYING PETITION OF ASSOCIATION FOR THE BENEFIT OF NONCONTRACT EMPLOYEES SUBMITTED ON FEBRUARY 11, 1963. NATIONAL MEDIATION BOARD FINDS NO GOOD AND SUFFICIENT REASON TO DEPART FROM ITS PREVIOUS DECISION AND REQUEST OF APRIL 3, 1963 IS THEREFORE DENIED. BY DIRECTION OF NATIONAL MEDIATION BOARD.

E. C. THOMPSON
EXECUTIVE SECRETARY
NATIONAL MEDIATION BOARD

OFFICIAL BALLOT

NATIONAL MEDIATION BOARD
(AN AGENCY OF THE U. S. GOVERNMENT)
CASE No. R-3590
CLERICAL, OFFICE, STORES, FLEET,
AND PASSENGER SERVICE EMPLOYEES
UNITED AIR LINES, INC.
April 22, 1963 to May 22, 1963

(Purpose of Election and Instructions for Voting by U. S. mail explained on Reverse Side)

If you desire to be represented by AIR TRANSPORT DIVISION, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO	If you desire to be represented by AIRLINE DIVISION, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO.
Mark an "X" in this square ☐	Mark an "X" in this square ☐

If you desire to be represented by — ANY OTHER ORGANIZATION OR INDIVIDUAL
Write name of such organization or individual in space below and mark an "X" in this square

_____ ☐

This is a SECRET BALLOT Do not sign your name	Marks in more than one square will make ballot illegal

Return this ballot in its entirety. Do not cut, mutilate or otherwise spoil it. If you do so, return ballot at once to the Mediator and obtain a new one.

Exhibit No. 23

PURPOSE OF ELECTION

A dispute exists among the craft or class of employees named on the reverse side of this ballot as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, and the National Mediation Board (an agency of the U. S. Government) is taking a SECRET BALLOT in order to ascertain and to certify the names or name of organizations or individuals designated and authorized to act as representatives for the purpose of the Act.

INSTRUCTIONS FOR VOTING BY MAIL

An official ballot, a SECRET "A" envelope, and a return addressed mailing envelope (no postage required) are enclosed herewith. To vote by mail, carry out the following instructions:

Mark an "X" in the square of your choice, fold and place the ballot in the SECRET envelope marked "A", seal the envelope without placing any mark of identification thereon. After sealing the envelope marked "A", place it in the mailing envelope marked "BALLOT" and seal; then PLACE YOUR NAME AND ADDRESS IN THE UPPER LEFT-HAND CORNER OF THE MAILING ENVELOPE MARKED "BALLOT". Deposit this envelope, which requires no postage, in the U. S. Mail so as to reach the Post Office in Chicago, Illinois, **not later than 5:00 P. M., May 22, 1963.**

After the mailing envelope has been checked against the eligibility list, that envelope will be destroyed and the SECRET "A" envelope will then be mixed with other SECRET "A" envelopes before being opened by Mediator, thus insuring complete secrecy.

YOUR BALLOT CANNOT BE COUNTED UNLESS YOU PLACE YOUR NAME AND ADDRESS ON THE MAILING ENVELOPE.

Exhibit 23 (page 2)

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Exhibit 24

PENNSYLVANIA SYSTEM MACHINISTS' APPRENTICES', AND HELPERS' OFFICIAL BALLOT

A dispute exists between the carrier and System Federation No. 90 of the Railway Employees' Department of the A.F. of L. as to who the employees in the craft above named desire to be represented by in the conference to negotiate rules and working conditions.

The machinists, apprentices, and helpers, irrespective of membership or non-membership in any organization, are therefore to be given an opportunity to designate, by a majority vote, the representation of their choice, as follows:

Those in favor of either of the following will designate their choice by marking an X in the square set out for that purpose.

Those who desire to be represented by System Federation No. 90, Railway Employees' Department of the A.F. of L., mark an X in this square _____ ☐

Those who desire to be represented by the American Federation of Railroad Workers, mark an X in this square _____ ☐

Those who desire to be represented by individuals or by any other organization, write the name of such individual or organization here _____

_____

and mark an X in this square _____ ☐

Place employed _____

Craft _____

Actually working _____

Laid off or furloughed _____

Name of voter _____

Exhibit 25

LONG ISLAND RAILROAD COMPANY CROSSING WATCHMEN

OFFICIAL BALLOT

A dispute exists between the carrier and the United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers as to whom the crossing watchmen desire to be represented by in conference to negotiate rules and working conditions.

The crossing watchmen, irrespective of membership or nonmembership in any organization, are to be given an opportunity to designate by a majority vote the representatives of their choice as follows:

Those in favor of either of the following will designate their choice by marking an X in the square set out for that purpose:

Those who desire to be represented by the Long Island Railroad Crossing Watchmen's Association, mark an X in this square _____ ☐

Those who desire to be represented by the United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers, mark an X in this square _____ ☐

Those who desire to be represented by individuals or by any other organization, write the name of such individual or organization here _____

_____

and mark an X in this square _____ ☐

Exhibit 26

OFFICIAL BALLOT
of
MECHANICAL DEPARTMENT EMPLOYEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

June 4 - 18, 1934

Dispute exists with respect to representation of the Mechanical Department employees as to whether a majority desire representation by the Association of Mechanical Crafts, Helpers and Apprentices, D. & R. G. W. R. R., or desire representation by System Federation No. 10, Railway Employees' Department, American Federation of Labor, and it has been agreed that a secret ballot be taken to determine the fact.

IF YOU DESIRE REPRESENTATION BY THE ASSOCIATION OF MECHANICAL CRAFTS, HELPERS AND APPRENTICES, D.&R. G. W. RR., MARK AN "X" IN THIS SQUARE _____ ☐

IF YOU DESIRE REPRESENTATION BY SYSTEM FEDERATION NO. 10, RAILWAY EMPLOYEES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, MARK AN "X" IN THIS SQUARE ☐

IF YOU DESIRE REPRESENTATION BY ANY OTHER ORGANIZATION OR INDIVIDUAL, WRITE IN NAME AND MARK AN "X" IN THIS SQUARE _____ ☐

(The writing of more than one X will make the ballot illegal)

DO NOT SIGN YOUR NAME

Exhibit 27

OFFICIAL BALLOT
of
SHEET METAL WORKERS, HELPERS AND APPRENTICES

employees of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILOAD CO.

R-2962

June 1956 to July 1956

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, and the National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized as representatives for purposes of the Act.

INSTRUCTIONS FOR VOTING

Mark an "X" in the square of your choice. Marks in more than one square make ballot void.

If you desire to be represented by:

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION

(Functioning through System Federation No. 76, Railway Employes' Department, AFL)

Mark an "X" in this square _____ ☐

If you desire to be represented by:

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE USA AND CANADA OF AF of L

Mark an "X" in this square _____ ☐

If you desire to be represented by:,

ANY OTHER ORGANIZATION OR INDIVIDUAL

Write name of such organization or individual on the line below,

_____ AND,

Mark an "X" in this square _____ ☐

NOTICE

1. This is a SECRET BALLOT: Do not sign your name.
2. Return this ballot in its entirety. Do not cut, mutilate or otherwise spoil it. If you do so, return ballot at once to the Mediator and obtain a new one.

Exhibit 28

NATIONAL MEDIATION BOARD
Washington

Case No. R-3535

CERTIFICATION

March 16, 1962

In the Matter of
REPRESENTATION OF EMPLOYEES
of the ALOHA AIRLINES, INC.

Clerical, Office, Stores, Fleet and Passenger Service Employees

The services of the National Mediation Board were invoked by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Clerical, Office, Stores, Fleet and Passenger Service Employees, employees of Aloha Airlines, Inc.

At the time application was received, these employees were represented by the International Association of Machinists, AFL-CIO, Airline Division.

The Board assigned Mediator Clarence G. Eddy to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the employees concerned and by direction of the Board, the mediator was instructed to conduct an election by secret ballot, using an agreed to eligible list to determine the employees' representation choice.

The following is the result of the election as reported by the mediator and attested on March 8, 1962, by representa-

tives of the contesting organizations who acted as observers.

Number of employees voting:

Clerical, Office, Stores, Fleet and Passenger Service Employees

International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America	International Association of Machinists, AFL-CIO, Airline Division	Void Ballots	Number of Employees Eligible
93	97	1	212

The National Mediation Board further finds that the carrier and employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation.

CERTIFICATION

Therefore, the National Mediation Board certifies that the International Association of Machinists, AFL-CIO, Airline Division, has been duly designated and authorized to continue to represent for the purposes of the Railway Labor Act, the craft or class of Clerical Office, Stores, Fleet and Passenger Service Employees, employees of Aloha Airlines, Inc., its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

Exhibit 28

NATIONAL MEDIATION BOARD
Washington

Case No. R-2953

DISMISSAL

February 13, 1956

In the matter of
REPRESENTATION OF EMPLOYEES
of the
SOUTHERN AIRWAYS, INC.

Clerical, Office, Fleet and Passenger Service Employees

The services of the National Mediation Board were invoked by the Air Line Agents Association, International, to investigate and determine who may represent for purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, Clerical, Office, Fleet and Passenger Service Employees, employees of the Southern Airways, Inc.

At the time application was received, these employees were not represented by any organization or individual.

The Board assigned mediator A. Alfred Della Corte to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the employees concerned and by direction of the Board, the mediator conducted an election by U. S. mail ballot, using an agreed to eligible list to determine the employee's representation choice.

The following is the result of the election as reported by Thomas A. Tracy, who was assigned to count the ballots in this case and attested on July 22, 1955, by representative of the applicant organization.

Number of employees voting:

Clerical, Office, Fleet and Passenger Service Employees

Air Line Agents Association, Int'l.	Any Other Org. or Individual	Void Ballots	Number of Employees Eligible
42	0	0	207

The National Mediation Board further finds that the carrier and employees in this case are respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein and that the interested parties were given due notice of investigation, whereupon the National Mediation Board finds that:

On the basis of the investigation and report of election, which shows that less than a majority of eligible employees participated in the election, the National Mediation Board finds no basis for Certification and the application is therefore dismissed.

By order of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

IN THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 973-63

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES,

Plaintiff,

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; and HOWARD G. GAMSER, Individually and as Member of the National Mediation Board,

Defendants.

Order Extending Temporary Restraining Order

This cause came on to be heard this day on plaintiff's motion for a preliminary injunction, and the court has decided to take the matter under advisement and to defer its ruling thereon. It appears to the court from the verified complaint and the affidavits, memoranda and argument presented in support of the motion and in opposition thereto, that defendants will conduct a representation election under section 2 of the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. § 152, affecting some 6400 employees represented by plaintiff, unless restrained by order of this court. It further appears that immediate and irreparable injury, loss and damage will result to plaintiff unless defendants are so restrained pending the determination of plaintiff's motion for preliminary injunction.

IT IS ORDERED, therefore, that the temporary restraining order issued in this cause on the 18th day of April 1963, be and is hereby extended to 10:00 A.M. on the 25th day of April 1963, and thereafter until the Court files its order.

Dated: April 24, 1963 2:40 P.M.

(SIGNED) LUTHER W. YOUNGDAHL
United States District Judge

Exhibit Unnumbered — Filed May 3, 1963

NATIONAL MEDIATION BOARD

(An Agency of the U. S. Government)

NOTICE OF ELECTION

To Be Held Under the
RAILWAY LABOR ACT
Involving
Clerical, Office, Stores, Fleet,
and Passenger Service Employees
of
United Air Lines, Inc.
Chicago, Illinois, April 22, 1963

TO ALL CONCERNED:

A SECRET BALLOT will be conducted by United States Mail on the question of representation of CLERICAL, OFFICE, STORES, FLEET, AND PASSENGER SERVICE EMPLOYEES of United Air Lines, Inc. as submitted to the National Mediation Board by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees in Case No. R-3590.

Section 2, Fourth, of the Railway Labor Act, as amended, provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act."

Attention is called to Section 2, Railway Labor Act, providing that elections shall be free from interference, influence or coercion, etc.; also that it is unlawful for any carrier to interfere in any way with the organization of the employes, etc. Attention is also called to Order No. 2, issued by the National Mediation Board on May 29, 1936, and sent to the President of the Carrier in which it was ordered that "Notice in re Railway Labor Act" should be posted and maintained continuously in readable condition on all the usual and customary bulletin boards. The election will

be conducted in such a manner that interference, influence or coercion on the part of officers, foremen, or others in a supervisory capacity, will be avoided.

Reports of violation should be made to the Mediator or the National Mediation Board, Washington, D. C.

THE RULES TO GOVERN THE ELECTION ARE AS FOLLOWS:

1. The balloting will be conducted entirely by United States mail.
2. The Mediator will mail ballots including voting instructions to eligible voters. (Instructions for voting by U. S. Mail will be found on the reverse side of the ballot.) Should any voter fail to receive the ballot within a reasonable time, he should report the fact to the Mediator or the National Mediation Board, Washington, D. C.
3. Craft or Class: Employees eligible to vote shall be those designated as CLERICAL, OFFICE, STORES, FLEET, and PASSENGER SERVICE EMPLOYEES, appearing on the company payroll as of January 15, 1963, who retain an employe relation with the carrier on the date vote is taken. This includes those on furlough provided they are not employed by another carrier or in another craft or class on this carrier, those on authorized leave of absence, sick leave or injury. Dismissed employees, whose cases are being handled by the organization, on other than a leniency basis, will be considered eligible.
4. List of Eligible Voters: A list of the eligible voters has been prepared by Mediator W. H. Pierce and reviewed by party representatives. Only those employees whose names appear on such list will be permitted to vote, except that upon proof of error in the list, such error will be corrected.
5. Supervision of Election: The election will be supervised by a Mediator of the National Mediation Board, and he will interpret and apply the rules governing the election,

and decide on all challenged votes. His decision shall be final as to the immediate conduct of the election, but appeals may be made to the National Mediation Board, provided that notice of such appeal is given in writing to the Mediator prior to the submission of his report of the election to the Board. Each organization that is a party to this dispute, if it so desires, may appoint an observer to act as watcher. Such observers, or their properly authorized substitutes, will serve without liability or expense to the United States Government, and will be subject to the supervision and direction of the Mediator at all times.

6. The Official Ballot: The ballot to be used in the election has been reproduced by the direction of the National Mediation Board exactly the same type and with the same contents as facsimile ballot shown hereon.

7. Report on Election Results: The Mediator will count and tabulate all ballots in the presence of party observers, if any, at a time and place designated by the Mediator, at Chicago, Ill., beginning on May 27, 1963. A report giving the results of the election will be made by the Board's representative on a form prescribed by the Board and copy of this report will be furnished to the parties to the dispute.

8. Certification of Representatives: Proper certification of the name or names or the organization or individual that has been designated and authorized to represent the employees involved in this dispute will be made by the National Mediation Board to the parties in this dispute, and the same will also be certified to the carrier.

9. Final Disposition of Ballots: The original ballots and tabulation sheets, together with the report of the election by the Mediator, will be filled with the National Mediation Board at Washington, D. C., for reference and safekeeping.

By order of the NATIONAL MEDIATION BOARD

By: W. H. Pierce, *Mediator*

OFFICIAL BALLOT
NATIONAL MEDIATION BOARD
(AN AGENCY OF THE U. S. GOVERNMENT)
CASE No. R-3690
CLERICAL, OFFICE, STORES, FLEET, AND PASSENGER SERVICE EMPLOYEES
UNITED AIR LINES, INC.
April 22, 1963 to May 22, 1963

(Purpose of Election and Instructions for Voting by U. S. mail explained on Reverse Side.)

If you desire to be represented by AIR TRANSPORT DIVISION, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO
Mark an "X" in this square

If you desire to be represented by AIRLINE DIVISION, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO
Mark an "X" in this square

If you desire to be represented by ANY OTHER ORGANIZATION OR INDIVIDUAL
Write name of such organization or individual in space below and mark an "X" in this square

This is a SECRET BALLOT
Do not sign your name

Marks in more than one square will make ballot illegal

Return this ballot in its entirety. Do not cut, mutilate or otherwise spoil it. If you do so, return ballot at once to the Mediator and obtain a new one.

(Reverse Side of Ballot)

PURPOSE OF ELECTION

A dispute exists among the craft or class of employees named on the reverse side of this ballot as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, and the National Mediation Board (an agency of the U. S. Government) is taking a SECRET BALLOT

in order to ascertain and to certify the names or name of organizations or individuals designated and authorized to act as representatives for the purpose of the Act.

INSTRUCTIONS FOR VOTING BY MAIL

An official ballot, a SECRET "A" envelope, and a return addressed mailing envelope (no postage required) are enclosed herewith. To vote by mail, carry out the following instructions:

Mark an "X" in the square of your choice, fold and place the ballot in the SECRET envelope marked "A", seal the envelope without placing any mark of identification thereon. After sealing the envelope marked "A", place it in the mailing envelope marked "BALLOT" and seal; then PLACE YOUR NAME AND ADDRESS IN THE UPPER LEFT-HAND CORNER OF THE MAILING ENVELOPE MARKED "BALLOT". Deposit this envelope, which requires no postage, in the U. S. Mail so as to reach the Post Office in Chicago, Illinois, not later than 5:00 P.M., May 22, 1963.

After the mailing envelope has been checked against the eligibility list, that envelope will be destroyed and the SECRET "A" envelope will then be mixed with other SECRET "A" envelopes before being opened by Mediator, thus insuring complete secrecy.

YOUR BALLOT CANNOT BE COUNTED UNLESS YOU PLACE YOUR NAME AND ADDRESS ON THE MAILING ENVELOPE.

Civil Action No. 973-63

On April 18, 1963, Judge Hart of this court issued a temporary restraining order barring the National Mediation Board from proceeding with an election among certain categories of employees of United Air Lines for the election of a collective bargaining representative, pursuant to the Railway Labor Act, 45 U.S.C. §151 *et seq*, as made appli-

cable to employees of air carriers, 45 U.S.C. §§181-8. Ballots had been scheduled to be send out by mail to the employees on April 22, 1963. The temporary restraining order barred the mailing of these ballots pending the hearing, in this Court, on a motion for a preliminary injunction. This hearing was held on April 24, and this Court continued the temporary restraining order in effect so that the Court could consider fully the written memoranda and oral arguments of counsel and the complex legal issues raised in those arguments before finally issuing its order.

The Court now issues its order, on the basis of the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is an action brought by a group of employees of United Air Lines, Inc. (hereinafter called "United"), organized and incorporated under the name "Association for the Benefit of Non-contract Employees," the plaintiff herein. Plaintiff does not seek recognition as a bargaining agent, nor does it want its name on the ballot.

2. On August 24, 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter called the "Brotherhood"), filed an application with the National Mediation Board pursuant to 45 U.S.C. §152. Ninth, of the Railway Labor Act, for an investigation of a representation dispute among employees of United. The case was docketed as Case No. R-3590 by the Board. On November 19, 1962, the Mediator assigned by the Board began an investigation of this dispute and checked the authorization cards from thirty-five percent or more of the employees in the craft or class furnished by the Brotherhood in support of its application. As a result of the Mediator's investigation, it was determined that a representation dispute existed among these employees, between two unions, the Brotherhood and the International Association of Machinists (hereinafter called "Machin-

ists''). On December 19, 1962, in accordance with its rules, an election was authorized by the Board, and the Mediator asked United to furnish the names and addresses of eligible employees so the election could be held. Both the Brotherhood and the International sought to be certified as the collective bargaining representative, and both their names appear on the ballot which the Board has prepared.

3. The ''craft or class'' in which this representation dispute exists is defined by the Board as ''Clerical, Office, Stores, Fleet and Passenger Service employees'' of United. This ''craft or class'' was established by the Board in 1947. There are approximately 12,300 employees certified to vote in this election as members of this craft or class. The plaintiff purports to represent 6,400 of these employees. Cards signed by the employees authorizing the plaintiff to represent the employee before the Board are in the possession of the Board. The Board has made no attempt to verify the number of authorization cards, nor to check the signatures on the cards against the eligible list of voters.

4. The official ballot provides a square in which the voter can mark an ''X'' if he wishes to be represented by the Brotherhood, another square to be marked if he wishes to be represented by the International, and a blank line where the voter can write the name of an organization or an individual ''[i]f you desire to be represented by ANY OTHER ORGANIZATION OR INDIVIDUAL.'' There is no place on the ballot where a voter could state that he prefers no collective bargaining representation. If a voter should write ''no representation'' or ''no union'' on the ballot, the ballot would be counted by the Board as void. The ballots are secret, and returnable by mail.

5. On February 14, 1963, the Board received from the plaintiff a petition asking leave to intervene in the representation dispute and asking that the class or craft grouping be changed either with or without a hearing, and that the form of the ballot be changed to permit the voters to

express a preference for no collective bargaining representation. On February 25, 1963, the plaintiff forwarded to the Board a statement which included the following points:

1. We are not seeking recognition as a bargaining agent; we do not want our name on the ballot.
2. We have no intention of becoming a Company union.
3. We are not sanctioned, recognized, or assisted in any way by United Airlines management.
4. Our Association will be dissolved after such time as it has served its purpose.

The Board determined that the plaintiff was not a properly constituted party at interest in the pending dispute, and on March 27, 1963, informed the plaintiff that its petition was dismissed. On April 5, 1963, the plaintiff requested the Board to reconsider its denial of the petition to intervene. On April 12, 1963, the Board denied plaintiff's request for reconsideration. The present suit was filed on April 13, seeking to enjoin the Board from mailing out the ballots on the scheduled date of April 22, 1963.

CONCLUSIONS OF LAW

Based on the findings of fact heretofore set forth, and for the reasons fully set forth in a memorandum attached hereto, which memorandum is specifically made a part of these findings of fact and conclusions of law, the Court has reached the following conclusions:

1. The Court has jurisdiction over the subject matter of this action.

2. The plaintiff would be irreparably injured by the holding of said election without having an opportunity to express on the ballot a preference for no collective bargaining representation.

3. The balance of convenience is in favor of the plaintiff.

4. The public interest requires a determination of the legality of the above election before the ballots are sent out.

5. The Railway Labor Act, 45 U.S.C. §151 *et seq*, requires that there shall be on the above ballots a place where eligible voters may express a preference for no collective bargaining representation.

WHEREFORE, it is by the Court this 3d day of May, 1963,

ORDERED That the plaintiff's motion for a preliminary injunction enjoining the defendant from conducting any election among the "Clerical, Office, Stores, Fleet and Passenger Service employees" of United Air Lines, Inc., [in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation shall be and the same is hereby granted;] and it is

FURTHER ORDERED That the defendant shall have one week from today's date to show cause why the preliminary injunction above granted shall not be made permanent, and it is

FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. §151 *et seq* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation.

Luther W. Youngdahl
Judge

MEMORANDUM

This memorandum shall specifically be considered a part of the findings of fact and conclusions of law, *supra*.

I

Preliminary Injunction

1. *Jurisdiction.*

This action raises serious questions involving the proper interpretation of certain provisions of the Railway Labor Act, 45 U.S.C. §151 *et seq.* For the reasons fully set forth in Part II, *infra*, this Court has jurisdiction to issue a permanent injunction. Wherever equity has jurisdiction to grant an injunction by final decree, it has jurisdiction to grant a preliminary injunction. *American Code Co.* v. *Bensinger*, 282 F. 829, 835 (2d Cir. 1922).[1]

2. *Appropriateness of Preliminary Injunction.*

"The award of a preliminary injunction is an extraordinary remedy which will not be granted unless upon a clear showing of probable success and possible irreparable injury to plaintiffs * * *." *Societe Comptoir de L'Industrie Cotonniere Etablissements Boussac* v. *Alexander's Dept. Stores, Inc.*, 299 F. 2d 33, 35 (1962).

> The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise

[1] Nor is the present application for a preliminary injunction in any way barred by the fact that another judge of the District Court, as well as the Court of Appeals, have both denied a preliminary injunction in another case which involves the same disputed election, *United Airlines, Inc.* v. *National Mediation Bd.*, Civil No. 402-63, now on appeal, since it was agreed at oral argument before me that one of the important issues argued before both courts in that case was the question of whether the employer, United Airlines, had standing to enjoin an election among its employees—an issue obviously not in any way involved in the present application, and since it was further agreed that the orders in that case do not indicate the grounds for the two denials. Both courts in the other case may well have decided largely on the basis of this issue of the employer's standing.

result to the plaintiff. * * * Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. * * * But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944).

The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate * * * carrier to perform its service to the public, is a matter of public concern. * * * Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Virginian Ry. Co. v. System Fed'n 40, Ry. Employees Dep't, 300 U.S. 515, 552 (1937).

Taking into account the above principles, this Court, to grant a preliminary injunction which would bar the National Mediation Board from proceeding with the disputed election, must conclude that the plaintiff may be irreparably injured by the holding of such election; that the balance of convenience favors the plaintiff in the sense that the inconvenience which would flow to it from holding the election is greater than the inconvenience which would flow to the National Mediation Board from postponing the election; that the public interest will be advanced, not injured, by postponing the election; and that the plaintiff has made a clear showing of probable success in the ultimate determination of the merits.

Since the Court in Part II, *infra*, has decided to reach and determine the ultimate merits of the controversy, and since the Court therein has concluded that the scheduled election, if held, would be illegal under the Railway Labor

Act, 45 U.S.C. §151 *et seq*, the Court need consider here only the issues of irreparable injury, balance of convenience, and protection of the public interest.

a. *Irreparable Injury.* It is almost certain that the plaintiff would be irreparably injured if the scheduled election were to be held. As an association which seeks to have no collective bargaining representation, this association represents employees of United Airlines who do not wish to be joined with other employees who wish collective bargaining representation. The only way that the plaintiff can achieve its aim of having no representation, under the current procedure of the National Mediation Board, is to have a majority of the eligible votes actually refrain from returning a ballot. In that event, the Board will refuse to certify any collective bargaining representative. The chance of such a result, however, is slim, because the Board has refused to state, in its instructions sent to each eligible voter, that such is the Board's policy. If, instead of refraining to vote, the voter returns a ballot marked "No representation" or "No union," the ballot will be counted for purposes of participation, but will be tabulated as void; the voter would thus cast a ballot against the very position he seeks to support. Furthermore, even if this Association were to undertake to instruct all of its members not to return any ballot, the Board has not made clear exactly what must be done. Should the voter wishing to vote to have no collective bargaining representation simply fail to return anything? Or should such voter return, empty, either one or both of the two envelopes distributed by the Board—the "mailing envelope" and the "secret envelope marked 'A'"? If one or both of the envelopes should be returned, should the voter place his name and address on the envelope, or should he leave that blank?[2] The procedure which this Association should instruct its members to follow is, therefore,

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[2] The "Instructions for Voting by Mail" state: "YOUR BALLOT CANNOT BE COUNTED UNLESS YOU PLACE YOUR NAME AND ADDRESS ON THE MAILING ENVELOPE." (Exhibit 23.)

highly ambiguous, and the Board has indicated that it will take no action to correct the ambiguity.

What irreparable injury would result to the plaintiff from trying to follow such an ambiguous procedure? For one thing, for this Association even to *engage* in a campaign to urge employees *not* to vote opens the Association to charges by other employees that the Association employees are in some way opposed to democratic electoral procedures. To be sure, such "Don't vote" campaigns are occasionally thought necessary even in the most democratic of electoral procedures; but there is no doubt that even when necessary, such campaigns may leave the reputations of those conducting the campaign besmirched.

In addition, if the Association should not succeed in persuading a majority of eligible voters to refrain from returning their ballots, and the Board were therefore to certify a collective bargaining representative on the basis of the vote, in conformity with its stated policy,[3] then there is serious question whether any court would have jurisdiction to examine the legality of the electoral procedure. The Supreme Court has held that in at least one situation, federal District Courts do not have "the power to review the action of the National Mediation Board in issuing the certificate." *Switchmen's Union* v. *National Mediation Bd.* 320 U.S. 297, 300 (1943). But see *Airline Dispatchers Ass'n* v. *National Mediation Bd.*, 89 U.S. App. D.C. 24, 27-8

[3] The Board has also argued that there is no irreparable injury because it is not clear that the Board will certify a collective bargaining representative on the basis of the election, and hence that an injunction would be "premature." At the hearing on the motion for a preliminary injunction, however, the Board made clear that the only basis on which it would not certify a representative on the basis of the electoral results was if a majority of eligible voters failed to participate: "Under the practices of the Board there will be no certification of a representative unless a majority of those eligible to vote affirmatively, vote." (Statement of Mr. Leathers at the hearing.) The same policy of the Board was stated in Mr. Thompson's affidavit: "The Board does not issue a certification after a representation election has been held unless a majority of those eligible to participate in the election have cast *valid* ballots." (Affidavit, p. 11.)

(1951). And see *infra*, Part II, for further discussion. Such doubts about the availability of another remedy to correct the results of illegal governmental action can constitute part of the basis for a finding of irreparable injury, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952), especially when the actual damages, both present and future, are "of such nature as to be difficult, if not incapable, of measurement." *Ibid.* This Court therefore concludes that it is extremely likely that the plaintiff herein would be irreparably injured if the scheduled election were to proceed.

b. *Balance of Convenience.* The Board has made only the most general allegations of the inconvenience to it of having the election delayed:

> Delay will be unfair to the Board, which has already spent considerable time and effort assembling timely data necessary to proceed with an election. Much of this effort would be nullified by further delay in the election. (Board's Memorandum in opposition to plaintiffs' motion for preliminary injunction, p. 24.)

This statement is amplified in the affidavit of E. C. Thompson, Executive Secretary of the Board, as follows:

> The Board's records on Case R-3590 show this case has been under active handling by the Board since August 27, 1962 and a dispute was found to exist among the craft or class of employees involved on December 19, 1962. The Board's mediators have spent approximately three months in preparing a list of the eligible employees from the carrier's records due to the refusal of the carrier to furnish that information to the mediators. The eligible list has now been completed and agreed to by the contesting organizations, namely the BRC [the Brotherhood] and the IAM [the International]. The notice of election and ballots have been printed and the mediator is now in the process of preparing the ballots for mailing to the eligible employees. Any further delay at this time would nullify much of the effort expended by the Board to conduct an election. (Affidavit, p. 12.)

The very delays which the Board recounts, however, argue against any severe inconvenience from a further delay, since an election postponed this long can easily wait to have its legality determined. And the fact that the Board has already printed ballots is obviously a trifling argument in the face of the possible irreparable injuries to the plaintiff from the use of those very same ballots. The Court, therefore, concludes that the balance of convenience must be resolved in favor of the plaintiff.

c. *Public Interest.* The Board's allegations concerning the public interest in a speedy election are similarly general:

> It is in the public interest that the procedures of the [Railway Labor] Act, as applied by the Board in the light of its long and successful experience in railroad and airlines labor relations, should be promptly carried out. * * * The public interest would not be served by an injunction which delays settlement of this dispute. * * * Moreover, the granting of an injunction would injure those parties directly involved in the representation proceeding. The two unions involved are directly concerned. Delay of the election may seriously impair their organizing campaigns, which necessarily depend upon the timing of the election. Delay will also be unfair to the employees who have furnished authorization cards to the unions, indicating their desire to have the issue investigated by the Board and resolved through an election. (Board's Memorandum, *supra*, p. 22-4.)

There is no showing here of the need for any immediate negotiations between the employer and some collective bargaining representative, nor is there any showing of any threatened strikes or other threat to the continued services of the carrier. Indeed, this Court believes that more bitterness would probably be engendered by the holding of an election, the results of which might later be set aside as illegal, than by postponing the election pending a determination of its legality. In addition, the two unions which are

organizing their campaigns should surely be saved the expense of a second campaign which would be necessary if the results of the first election were set aside as illegal. Since the Board has failed to make a more precise showing that the public interest requires a speedy election, the Court is not intruding upon any preliminary findings which the Board's expertise might have entitled the Board to make; the Court therefore concludes that the interest of the public can best be served by a determination of the legality of the scheduled election now.

Because there is an extreme likelihood that plaintiff would be irreparably injured by the holding of the scheduled election, because the balance of convenience is in plaintiff's favor, and because the public interest requires that the legality of the election be determined before such election is held, the Court, pursuant to Rule 65, *Fed. R. Civ. P.*, will grant a preliminary injunction barring the scheduled election pending the final determination of the merits of this controversy.

II

The Merits

The Board has conceded that the plaintiff seeks, by the motion for preliminary injunction, the ultimate relief requested; indeed, the Board argues on this basis that the motion for a preliminary injunction should be denied, since a preliminary injunction should not be a means of obtaining such relief before a full consideration of the merits. (Memorandum in opposition to plaintiff's motion for preliminary injunction, pp. 18-20.) Normally, of course, such consideration of the merits would be heard later, and a preliminary injunction would issue solely on the basis of irreparable injury, the balance of convenience, and the public interest, as discussed in Part I, *supra*. In this case, however, the Court deems it appropriate to proceed immediately to the merits of the issues. The Court does so because the merits have been fully briefed and argued on the motion for pre-

liminary injunction,[4] and because there are no disputed facts.

1. *Jurisdiction.*

This is an action seeking a permanent injunction against the holding of an election to select a collective bargaining representative, upon the ground that the procedures of the National Mediation Board in preparing for the election and in soliciting the will of the majority do not conform to procedures required both by the Railway Labor Act, 45 U.S.C. §151 *et seq.*, and by the due process clause of the Fifth Amendment of the Constitution. This Court has jurisdiction under 28 U.S.C. §1337,[5] since the Railway Labor Act is an act of Congress regulating commerce, *Virginian Ry. Co.* v. *System Fed'n*, 300 U.S. 515, 553-7 (1937), and since 28 U.S.C. §1337 requires no monetary jurisdictional amount. *Felter* v. *Southern Pac. Co.*, 359 U.S. 326, 329 n. 4 (1959).

Such general jurisdiction, however, is not sufficient to dispose of the jurisdictional issue, since in cases involving the Railway Labor Act, jurisdiction to review actions of the unions, employers, or the National Mediation Board depends upon the particular issue upon which review is sought.

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[4] Some of the Board's argument-headings reveal the full extent to which the merits were briefed: "The Court is Without Jurisdiction Over the Subject Matter;" "Plaintiff's Contentions are Without Merit;" "Plaintiff Lacks Standing to Maintain This Action;" "Even if Plaintiff Were a Party to The Proceeding, It Would Not Be Entitled to a Hearing as to the Craft or Class;" "Plaintiff's Objections to the Form of Ballot are not Sound;" "The Board's Decision to use the Long Established Craft or Class and the Customary Form of Ballot is not Erroneous." It is true, of course, that all of these arguments were sub-arguments under a main heading to the effect that jurisdiction and the right to relief "are Not Clear" and that it "is Unlikely that Plaintiff Will Prevail Upon the Merits." Nevertheless, as the Board itself has conceded, it was forced to deal directly with those merits by virtue of the fact that the ultimate and the preliminary relief are inextricably tied together.

[5] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *." 28 U.S.C. §1337.

On the one hand, courts do not have jurisdiction to review the propriety of the Board's definition of the scope of a "craft or class," *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943), for:

> It has become well settled that in making "craft or class" determinations, the [Board] may regroup, amalgamate, or splinter "historic" bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a "class" for representation in a jurisdictional dispute is unreviewable in the courts. *UNA Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, 111 U.S. App. D.C. 121, 124, 294 F. 2d 905 (1961). *Accord, Air Line Stewards Ass'n* v. *National Mediation Bd.*, 111 U.S. App. D.C. 126, 294 F. 2d 910 (1961), *cert. denied*, 369 U.S. 810 (1962).

Nor do courts have jurisdiction to decide which of two unions seeking to be the collective bargaining representative should have been certified by the Board as the representative of such "craft or class," *General Committee, Bhd. of Locomotive Eng'rs* v. *Missouri R.R.-K.-T. Co.*, 320 U.S. 323 (1943).

> Where there is doubt as to representation and where there are rival jurisdictional claims, those doubts are to be resolved and the claims are to be vindicated or rejected not by the courts but by the administrative and other processes provided by the Act. *Flight Eng'rs' Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745, 757 (2d Cir. 1963).

Nor do courts have jurisdiction to decide whether particular employees should or should not have been declared eligible voters in a representation election. *Decker* v. *Venezolana*, 103 U.S. App. D.C. 301, 258 F.2d 153 (1958); *WES Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, ____ U.S. App. D.C. ____, 314 F.2d 234 (1962).

On the other hand, courts have taken jurisdiction to review actions of the Board where serious issues of constitu-

tionality or of statutory construction were presented. Thus federal courts have taken jurisdiction to decide whether the Railway Labor Act was within the power of Congress to enact and whether such Act required an employer to negotiate with a collective bargaining representative once such representative had been certified by the Board. *Virginian Ry. Co.* v. *System Fed'n* 300 U.S. 515 (1937). And the Supreme Court held that there was jurisdiction to decide whether the Act required the union bargaining representative to represent all employees within the class, regardless of race, thereby reversing lower federal courts which had held there was no such jurisdiction. *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944). The Court in *Tunstall* specifically distinguished the *Switchmen's Union* case, 323 U.S. at 213, for the reasons set forth in the companion case of *Steele* v. *Louisville & N. RR. Co.,* 323 U.S. 192, 204-5 (1944). Furthermore, the Court of Appeals has discussed the facts of the Board's procedures before reaching the conclusions that the "investigation" required by the statute, 45 U.S.C. §152. Ninth, had been held, and that no constitutional question of due process was presented. *WES Chapter* v. *National Mediation Bd., supra,* 314 F.2d at 237; *UNA Chapter* v. *National Mediation Bd., supra.* And the Court of Appeals has specifically taken jurisdiction to determine the correctness of a construction of the statute by the Board which limited the statute's geographical scope. *Air Line Dispatchers Ass'n* v. *National Mediation Bd.,* 89 U.S. App. D.C. 24, 189 F.2d 685 (1951), *cert. denied* 342 U.S. 849 (1951).

The *Air Line Dispatchers* case, *supra,* is highly important in setting the proper context for a resolution of this difficult question of whether or not this Court has jurisdiction over the particular issue presented here. That case carefully discussed the sweeping language of the *Switchmen's Union* case, *supra,* 320 U.S. at 300-6, which had severely limited the scope of judicial review over the Board's action, and concluded that a fundamental change had been

brought about by the enactment, subsequent to *Switchmen's Union*, of the Administrative Procedure Act, 5 U.S.C.A. §§1001-11. The Court of Appeals noted that §10 provides:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review. —Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." (5 U.S.C.A. §1009.)

The court went on to say that, although the Administrative Procedure Act was not intended to change existing case law as to particular issues which had previously been held not within judicial cognizance, such broad statements as that in the *Switchmen's Union* case to the effect that in view of the history of the Railway Labor Act a purpose to afford judicial remedy must plainly appear "should now be read in the light of the purpose of the Administrative Procedure Act subsequently enacted." 89 U.S. App. D.C. at 28. The court went on to quote from a document indicating that purpose:

> Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial. *Ibid.*

The court concluded that if "the nature of the question" was such as to suggest judicial review, then the Administrative Procedure Act would authorize such review. *Ibid.*

In the light of the Administrative Procedure Act, this Court views "the nature of the question" presented here as urgently requiring judicial review. The question involves a serious issue of statutory construction, possibly rising to constitutional dimensions.

The basic question is whether the Railway Labor Act denies to voters certified as eligible to vote in an election held pursuant to 45 U.S.C. §152. Ninth, for the selection of a collective bargaining representative, the chance to vote for no representation at all. Although the Board's policy is to refuse to certify any representative if a majority of eligible voters fail to *participate* in the election, the Board construes the statute as forbidding a direct vote for no representation. The Board's position as to the required interpretation of the statute is shown in the italicized portions of the following interchange between the Court and the attorney for the Board at the hearing on the present motion:

The Court: "Are you willing, on behalf of the Mediation Board, to have marked on the ballot a statement that the failure to vote will have the same effect as if they had voted 'No' and wished not to be represented by a union?"

Mr. Leathers: "I don't think I am authorized to make that representation."

The Court: "If you say that it is the same, why aren't you willing to agree to it?"

Mr. Leathers: "I am about to explain this, I think, in this way: *The Mediation Board has taken the position that the language of the statute requires a representative* and that a majority of those—the Supreme Court has held a majority of those voting are authorized to elect that representative. Now the Mediation Board feels that the form of ballot which they have been using over this long period of time, this form of ballot is not something new, it is not something untried."

The Court: "Whether it is something new or old doesn't help us much. The question is whether these people are being deprived of a right which they ought to have, to express their wishes as to whether they should be represented."

Mr. Leathers: "I think the short answer to that is that the Supreme Court has held that the majority of those actually voting are entitled to choose the representative."

The Court: "They claim they have no right to vote at all."

Mr. Leathers: "No, they have a right to vote. *They just don't have a right to vote for no representation.*"

The Court: "Isn't that in effect giving them no right to vote?"

Mr. Leathers: "No, because they can vote for one of the representatives if they wish to."

The Court: "Suppose they don't want to vote for either? They are denied the right to vote on that issue?"

Mr. Leathers: "Yes, that's right. Understand, they are not denied the right to express their views by refraining from voting."

After quoting from the language of the Supreme Court in *Virginian Ry. Co.* v. *System Fed'n, supra,* 300 U.S. at 559, Mr. Leathers went on to state:

Mr. Leathers: "The Supreme Court in that case seems to suggest that the rule here is the same rule as that in any election. In other words, *if you have a chance to elect two Congressmen, there is no chance on the ballot to say I don't want a Congressman at all.* The statute here, [45 U.S.C. §152. Second] provides for the solution of these disputes by representatives. The Board's function under [45 U.S.C. §152. Second] is to decide between the two disputants who claim they are representatives. There is nothing in the statute which provides——"

The Court: "Is there anything in the statute that indicates that a group who do not want to be represented should not also have the right to express themselves?"

Mr. Leathers: "I think the Supreme Court has so indicated in the *Virginian* case."

This Court believes that the legal issue thus squarely posed—whether in a vote for a collective bargaining representative of a "craft or class" designated by the Board, the Railway Labor Act requires that eligible voters shall have no right to cast a ballot against any representation at all—is of great importance and should be resolved by the courts. Indeed, the Board's own reliance on the *Virginian* case for the merits of its position shows clearly that the Supreme Court has already assumed jurisdiction over an issue which is closely related to—but not identical with—the one presented here.

I therefore conclude that this Court has jurisdiction to review those actions of the Board which reflect the Board's conclusion that the Railway Labor Act forbids a vote for no collective bargaining representation.

2. *Standing.*

The Board has raised no issue as to whether the plaintiff's members actually are, as alleged in the complaint, "personal service and clerical employees of United Air Lines." The Board's executive secretary has merely stated, by affidavit, that the cards authorizing the plaintiff to speak for its members were, as of April 22, 1963, being held in the Board's offices, and that:

> The [plaintiff] has stated they have presented a total of approximately 6,400 cards. No attempt has been made by the Board to verify this number or to check the signatures on the cards against the eligible list which has been prepared by the mediator for the reasons which are fully explained in Board's letter of March 27, 1963 * * *. (Thompson affidavit, p. 9.)

These reasons came down to one point:

> the [plaintiff] does not hold itself out as a representative for the purposes of collective bargaining under

> the Railway Labor Act, and accordingly, the [plaintiff] cannot be considered by the National Mediation Board as a bona fide intervenor * * *. (Exhibit B, letter of E. C. Thompson, March 27, 1963, p. 3.)

Since this decision of the Board depends completely upon the Board's construction of the statute as barring from formal participation any party not seeking to be an actual collective bargaining representative—as the plaintiff herein does not—the Board's argument on standing is merely another way of stating its position on the merits. Since the Board has made no argument that the plaintiff is not what the plaintiff is alleged to be—an association of employees in the "craft or class" in which the election is to be held—the Board must be deemed to have waived any need on the part of plaintiff to prove its own status in fact, since obviously such factual status, if challenged, would be just as relevant to a motion for preliminary injunction as it would be to the ultimate determination of the merits. The Court therefore concludes that the plaintiff has standing to maintain the action in court as an association composed of employees of United Air Lines who are in the "craft or class" in which the disputed election is scheduled.[6]

3. *The Ballot.*

The Board has construed the Railway Labor Act as forbidding a vote for no collective bargaining representation. This Court believes that this construction by the Board is contrary to one of the stated purposes of Congress in amending the Railway Labor Act in 1934, is not in harmony with the only language of the Supreme Court on the subject, overlooks the importance of freedom of expression on this issue, and is not required by the language of the statute.

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[6] The Court, of course, is here indicating no opinion as to whether the plaintiff should have been given "standing" by the Board as a formal "intervenor" in the Board's own proceedings.

45 U.S.C. §152 provides, in pertinent part, as follows:

> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
>
> Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. * * *
>
> Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice * * *.
>
> Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization * * *.
>
> * * * *
>
> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon re-

quest of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. * * *

* * * *

Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever

> is the later, all employees shall become members of the labor organization representing their craft or class * * *.

Several observations must be made about these statutory provisions. The first is that employees have "*the right* to organize and bargain collectively through representatives of their own choosing." Fourth, *supra.* (Emphasis added.) There is no *requirement* that they bargain collectively. Such freedom to bargain collectively or not is reinforced by the provision that no carrier "shall require any person seeking employment to sign any contract or agreement promising *to join or not to join* a labor organization * * *." Fifth, *supra.* (Emphasis added.) Only where a carrier and the employers have mutually agreed upon a union shop must an employee agree to join a labor organization. Eleventh, *supra.* Thus *freedom* of association or non-association is emphasized in the statutory language.

Of course, the statutory scheme does assume that, in most cases, employees *will* bargain collectively. The whole scheme assumes that there are "disputes" between the carrier or carriers on one side, and the employees on the other. Second, *supra.* The statute then establishes machinery for the determination of who among the employees will be the bargaining representative, Ninth, *supra,* and requires that the carrier keep out of such machinery. Third, Fourth, Fifth, *supra.* But if true employer-employee "disputes" do not happen to arise in such an across-the-board fashion, as seems to be the case when there are a variety of different individual agreements between employer and employee negotiated, by the wishes of both parties, on a one-to-one basis, then the assumption behind the statute disappears, and the whole point behind having the collective bargaining representative disappears. The issue in this case is whether employees have a right to vote, in effect, that such employer-employee "disputes" do not happen to exist in their particular category of employment, and whether if the Board

decides to hold the "secret ballot" provided in Ninth, *supra*, such employees have a right to indicate their preference on the ballot?

It is not surprising that the statute as such does not answer this question. Congress, in 1934, was concentrating upon erecting machinery which would *force* reluctant employers to deal with the chosen representatives of their employees. *Virginian Ry. Co.* v. *System Fed'n*, 300 U.S. 515, 538-49 (1937). There are strong indications, however, that Congress intended employees to be free *not* to associate as well as to associate. Thus the House Committee on Interstate and Foreign Commerce, in reporting the bill containing the 1934 amendments which put teeth in the Act, declared:

> 2. It provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire and forbids interference by the carriers' officers with the exercise of said rights. H.R. Rep. No. 1944 to accompany H.R. 9861, 73d Cong., 2d Sess., 2 (1934).

During the hearings on this and related bills, Commissioner Joseph P. Eastman, Federal Co-Ordinator of Transportation and "draftsman of the 1934 amendments," *Switchmen's Union, supra*, 320 U.S. at 302, testified as follows:

> MR. HUDDLESTON: "Well, as I get your idea it is the purpose of this bill not to coerce organizations and not necessarily to imply an organization."
>
> COMMISSIONER EASTMAN: "No; it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." *Hearings on H.R. 7650 and H.R. 9689 before the House Committee on Inter-*

state and Foreign Commerce, 73d Cong., 2d Sess., 57 (1934).

And on a similar Senate bill, Senator Wagner, the great champion of the rights of Labor, declared:

> SENATOR WAGNER: "* * * I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not to join any union or to remain unorganized." *Hearings on S. 3266. Before the Senate Committee on Interstate Commerce*, 73d Cong., 2d Sess., 76 (1934).

Such statements, while not conclusive, strongly support the Court's conviction that employees, under the statute, have a right to vote for no representation.

One thing that is clear in the statute, however, is that the Act gives to the "majority" of any craft or class of employees "the right to determine who shall be the representative * * *." Fourth, *supra*. Do the present practices of the Board protect the rights of this "majority"? The Board claims they do because if a majority fails to return any ballot, then no representative is certified. But what if slightly *less* than a majority "boycott" the election by failing to return their ballots? Out of 12,000 eligible voters, let us say, suppose that 5,000 "boycott" the election, 4,000 vote for one union, and 3,000 vote for another union. Since a majority of the eligible voters participated, a representative will be certified. That representative would be the union receiving 4,000 votes. Clearly, this is not majority rule; it is not even plurality rule. But it is the Board's interpretation of what the statute requires. In the *Virginian* case the Supreme Court accepted the Board's interpretation that if a majority of the eligible voters actually participated, then a majority of those participating could determine who should be certified. But the rationale the Supreme

Court used to reach this result is directly contrary to the Board's notion that those voters "boycotting" the election are indicating their preference for no representation. The Supreme Court justified a certification on the basis of majority participation because "[t]hose who do not participate 'are presumed to assent to the expressed will of the majority of those voting.'" 300 U.S. at 560. (Citations omitted.) That the Supreme Court clearly intended to adopt a construction of the statute which would encourage participation in these elections is shown by its subsequent statement that "[t]here is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer." *Ibid.* The Board's interpretation of the statute thus encourages the very nonparticipation which the Supreme Court sought to discourage.

It must be added that in the *Virginian* case, *supra*, the Supreme Court did not deal with the issue before the Court in the present case. No issue was raised as to the form of ballot, and neither party was arguing that employees should be permitted to vote for no representation. Indeed, as far as this Court knows, the electoral dispute which is the subject of this case is the first to raise this issue in the courts.[7]

The Board argues that since under 45 U.S.C. § 152, Ninth, *supra*, the Board may certify a collective bargaining representative without holding an election at all, then "[*a*] *fortiori*, if the statute does not require an election, it does not require a ballot in any particular form if the Board determines to go ahead with an election." (Board's Memo-

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[7] *Radio Officers' Union* v. *National Mediation Bd.*, 86 U.S. App. D.C. 319, 181 F.2d 801 (1950) upheld the Board in its refusal to certify a representative on the basis of minority participation. This, indeed, had been the result in the *Virginian* case in the District Court as to the one craft or class in which a majority had refrained from voting. *System Fed'n* v. *Virginian Ry. Co.*, 11 F. Supp. 621, 628 (D. Va. 1935). This part of the lower court's holding was not appealed, and was therefore not before the Supreme Court. 300 U.S. at 559.

randum, p. 13.) Obviously, however, such an argument proves too much, since there are some forms of ballot—one, for instance, which left off one of the unions certified to be a party to the dispute—which would be clearly illegal. This Court is merely indicating that *if* the Board decides to conduct its "investigation" by means of a "secret ballot," 45 U.S.C. § 152, Ninth, then that ballot must conform to the requirements of the statute.

In order to protect the vitality of these important electoral processes, this Court has concluded that the Railway Labor Act requires that employees be given the chance to vote directly for no collective bargaining representation. The National Labor Relations Board, under a statute whose language also left the issue open, adopted such a policy early in its history. In refusing to strike from the ballot the words "or by neither" in a campaign between two unions, the NLRB explained its position in terms which apply, as well, to the issue now before the Court:

> The Act, however, does not require an unwilling majority of employees to bargain through representatives. It merely guarantees and protects that right of a majority if it chooses to exercise it. Yet, if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one or other of the nominees. The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives. * * *
>
> It was contended * * * that the privilege of an employee to indicate that he does not desire either of the named unions to represent him, if it must be preserved, could also be expressed by refraining

> from voting or by casting a blank ballot. In line with other authorities * * * however, we indicated * * * that those not voting would be presumed to acquiesce in the choice of the majority who do vote, and thus the employee who does not desire to be represented by either designated union would not express this preference by refraining from voting. As to the solution of casting a blank ballot, the practice of the Board, again in line with other authorities, has been to hold that a blank ballot is to be regarded as a failure to vote by one qualified to do so. We see no advantage in forcing employees who disapprove of the nominees to adopt the rather ambiguous method of expression involved in casting a blank ballot, when their choice can be clearly indicated by providing a space therefor.
>
> For the reasons which we have outlined, it is the conclusion of the Board that a free expression of the desires of the majority of the employees in the unit found appropriate in the present case demands that the ballot provide for a space in which employees may indicate that they do not desire to be represented by either of the named organizations. *Interlake Iron Corp.*, 4 NLRB 55, 61-[illegible] (1937). (Footnotes omitted)[8]

There is a special reason why this Court has concluded that employees under the Railway Labor Act have a statutory right to vote for no representation. Since the scope of the "craft or class" has been committed to the unreviewable discretion of the Board, *UNA Chapter* v. *National Mediation Bd.*, 111 U.S. App. D.C. 121, 124 (1961), the chance for employees to vote for "no representation" is, in instances such as the present one, really the chance to vote against the particular "craft or class" designated by the Board.

[8] It should be noted that this policy of the NLRB was thus adopted long before Congress in express language gave employees under the National Labor Relations Act the right "to refrain from" organizing.

Such a chance to vote against bargaining collectively with employees performing different functions under different conditions is a necessary safeguard against arbitrary action by the Board. If the courts cannot review the Board's grouping of such crafts or classes, then it is particularly important that the processes for majority determination be kept sharp and unambiguous.

This Court therefore concludes that an injunction should issue barring the Board from proceeding with the scheduled election unless the ballots are changed to provide a space in which the voters can vote for no representation.

Because the Board's position on the other issues raised by plaintiff—requesting a "hearing" on the appropriateness of the class or craft designated, at which the plaintiff would have status as a party-in-interest—depends partly upon the Board's interpretation of the statute as not permitting a vote against representation, the Court will decline to express any opinion on those issues and will instead remand the matter to the Board for further consideration in light of the fact that the Board's interpretation of the statute has been found erroneous. The Court therefore does not reach any constitutional issues of due process.

In the unforeseen event that the Court has failed to give consideration to some argument of the Board which would be relevant to the granting or withholding of a permanent injunction but was not relevant to the granting or withholding of a preliminary injunction, the Court will issue an order, returnable within one week, for the Board to show cause why the preliminary injunction should not be made permanent.

/s/ LUTHER W. YOUNGDAHL
Judge

May 3, 1963

Motion for Leave to Intervene as a Party Defendant

Comes now the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer which accompanies this motion. As grounds for this motion the applicant states:

1. It is the labor organization which, as alleged in paragraph V of the complaint, requested the National Mediation Board to initiate the proceedings which are the subject of this action.

2. It asserts defenses to plaintiff's claim which have not been presented by the present defendants and its interest in the proceedings before the Board are not adequately represented by the present defendants and the determination of the form and manner of election in this action may be binding.

3. The applicant is so situated that it may be adversely affected by a determination of the issues in the main action.

4. The applicant has defenses to the plaintiff's claim presenting questions of law and fact which are common to the main action.

5. There is attached hereto an answer to the complaint setting forth the claims and defenses for which intervention is sought.

WHEREFORE, the applicant prays that this motion be granted.

Respectfully submitted,

* * * *

Memorandum in Opposition to Applicant's Motion for Leave to Intervene as a Party Defendant

Plaintiff Association for the Benefit of Non-Contract Employees respectfully submits this memorandum in opposition to applicant's motion for leave to intervene as a party defendant.

Plaintiff opposes applicant's motion on the ground (1) that it fails to state grounds entitling applicant to intervene either as a matter of right or permissively, and (2) that it is untimely.

Response to Order to Show Cause

By its Order dated May 3, 1963, the Court granted defendants one wek to show cause why the preliminary injunction granted by that Order should not be made permanent. In response to the Order to Show Cause, defendants draw the Court's attention to their Motion to Dismiss the Complaint, or in the Alternative, for Summary Judgment filed herewith and the affidavits and memoranda submitted in support thereof and on the basis thereof oppose the entry of a permanent injunction against defendants and move the Court:

1. That the Court reconsider and vacate the preliminary injuction previously granted herein; and

2. That should the Court deny the motion to vacate the preliminary injunction that it stay the preliminary injunction and allow the Mediation Board to conduct the proposed election.

Filed 5/10/63

Motion of Defendants to Dismiss the Complaint or, in the Alternative, for Summary Judgment

Defendants, by their undersigned attorneys, move the Court to enter an order dismissing the complaint or, in the alternative, to enter an order for summary judgment upon the grounds that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law in that:

1. The Court is without jurisdiction over the subject matter; and

2. Plaintiff lacks standing to maintain this action; and

3. The complaint fails to state a justiciable controversy; and

4. Plaintiff is not entitled to injunctive relief since

(a) the action is premature;

(b) plaintiff does not demonstrate irreparable injury; and

(c) the action taken by the National Mediation Board is not erroneous,

and in support of their motion defendants rely on the affidavit of Eugene C. Thompson, Executive Secretary of the National Mediation Board, dated April 22, 1963 and the exhibits attached thereto, defendants' memorandum in opposition to plaintiff's motion for a preliminary injunction and the affidavit of Francis A. O'Neil, Jr., dated May 10, 1963 and the memorandum of points and authorities in support of the motion for summary judgment both attached hereto and made a part hereof.

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } SS

AFFIDAVIT

Francis A. O'Neill, Jr., being duly sworn, says:

1. I am a duly appointed member of the National Mediation Board and have served in that capacity continuously since April 1, 1947. I am fully familiar with the proceedings heretofore had in this action and more particularly the findings of fact, conclusions of law, order and opinion filed and entered by the Court on May 3, 1963. In the opinion of the National Mediation Board the limitations therein set forth upon the discretion of the Board with respect to the form of ballot which may be used in carrying out the investigation under Section 2, Ninth will have a far-reaching and adverse effect on the orderly administration of the Railway Labor Act, particularly in the performance of the Board's duty and function to resolve disputes where a determination must be made as to the identity of the duly designated representative for collective bargaining purposes of a majority of employees in a craft or class.

2. Section 2, Ninth of the Railway Labor Act (45 U.S.C. 152, Ninth) provides in part:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier."

In the present case the Board determined to hold an election on December 19, 1962. Since that date its mediators have spent approximately three months in determining a list of approximately 13,000 eligible employees from the carrier's records. The eligible list was completed and agreed to by the contesting organizations, namely, the BRC and the IAM as of April 1, 1963. Since there is a constant change in the employees of United Air Lines comprising the craft or class involved, it will, in the opinion of the Board, be necessary to prepare a new list of eligible voters unless the ballots are mailed on or before June 1, 1963. It is estimated that the compilation of the new list will require approximately the same time and expense as that involved in compiling the original list. While, of course, in this case it was not possible for the Board to comply with the statutory directive to certify a representative within thirty days, in the opinion of the Board a further delay required by the need for compiling such a new list will necessarily hamper and frustrate the discharge of the Board's responsibilities under the Railway Labor Act.

3. The form of ballot prepared by the Board in this case is substantially the form of ballot which has been in use since 1934. This form of ballot was first authorized by the U. S. Railroad Labor Board in its Decision No. 218, dated July 26, 1921. The ballot was later revised by the U. S. Railroad Labor Board in its Decision No. 418, dated November 19, 1921, by omitting identifying information. Following creation of the National Mediation Board on June 21, 1934, the Board on August 4, 1934, formulated and approved rules for conducting representation elections. The ballot sanctioned by this action is attached to Mr. Thompson's affidavit marked Exhibit 27. This form of ballot has been used by the Board in over 3,400 representation elections among various crafts or classes of railroad and airline employees since 1934. The National Mediation Board has published a pamphlet entitled *Administration of the Railway Labor Act by The National Mediation Board,* 1934-1957. The duty of the Mediation Board is described in the preface as follows:

"The principal duty of the National Mediation Board is to assist in the creation and maintenance of a sound mutual understanding between carriers and their employees covered by the Railway Labor Act. The first purpose of the act as stated therein is 'to avoid any interruption to commerce or to the operation of any carrier engaged therein.' A mutual understanding of each other's problems is necessary before a successful solution can be reached in any dispute. It is, therefore, the duty of the National Mediation Board, through its members and staff of mediators, to bring about such an understanding and to promote and maintain peace and order in labor relations, as a means of avoiding interruptions to interstate commerce."

The background and reason for the traditional form of ballot is stated as follows:

"Occasionally, it is suggested that the ballot used by the National Mediation Board does not permit a clear expression by a majority of eligible voters of their representation preference. The Mediation Board adopted, among the first rules issued by it, its present form of ballot and it has been used consistently since that time.

"The pertinent part of the ballot provides a space to vote for the contending organizations and, in addition thereto, the following:

If you desire to be represented by any other organization or individual write the name of such organization or individual in the space below.

* * * *

And mark an "X" in this square ☐

"The form of ballot used is based on the general purpose of the Railway Labor Act as contained in

section 2, which provides, among other purposes, for the complete independence of carriers and of employees in the matter of self organization; and, 'to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules of working conditions.' In the furtherance of these general purposes, section 2, second, of the act makes it the duty of the carriers and their employees to consider and, if possible, decide, all disputes, 'in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.' Section 2, third, provides that 'representatives, for the purpose of this act, shall be designated by the respective parties without interference, influence, or coercion by either party after the designation of representatives by the other * * *.'

"The above-quoted excerpts from the act show clearly that it was the intent of Congress in framing the 1934 amendments to the original Railway Labor Act of 1926, that both the carriers and employees separetely designate representatives for the purposes of collective bargaining. To effectuate this mandate of the Congress, the National Mediation Board, in 1934, designed the form of ballot which has been used without material change to the present time. This ballot was drafted to permit the employees to secure some form of representation, as contemplated in the sections of the law quoted above. It leaves to the majority of the employees of any craft or class full freedom to determine who shall be their representative for the purposes of the act."

Since the investigation of a representation dispute by the Mediation Board is initiated by a request of one of the

parties to the dispute, the form of ballot to be used in case an election is held has, in the opinion of the Board, a direct bearing upon whether the parties to the dispute will resort to self-help or will seek the services of the Board in resolving a representation dispute. The decision issued by the Court on May 3, 1963 concludes that the Board should be barred from proceeding with the scheduled election unless the ballots are changed to provide a space in which the voters can vote for no representation. In the opinion of the National Mediation Board any requirement that the ballot used in a representation dispute be changed to provide a space in which the voters can vote for no representation will tend to encourage the parties to a representation dispute to resort to self-help rather than to seek the services of the Board in resolving the representation dispute and will result in strikes and unrest in the industries covered by the Railway Labor Act which would not result were the normal form of ballot used.

In the more than 3,400 elections which have been held by the Board using the traditional form of ballot there has been complete cooperation by individuals and organizations seeking a representation of employees in the various crafts or classes. The original Railway Labor Act passed in 1926 did not have a provision comparable to Section 2, Ninth. During that period, I am informed that it was exceedingly difficult to resolve any dispute involving wages, hours, and conditions of employment by reason of the fact that machinery was not provided to determine a representative of a craft or class. In some instances resort was had to self-help to force a resolution of disputes involving wages, hours, and conditions of employment, as well as representation.

/s/ Francis A. O'Neill, Jr.

Subscribed and sworn to before me
this 10th day of May, 1963

Mary Jane Scoville

My commission expires August 31, 1964

Statement of Material Facts as to Which Defendants Contend There is No Genuine Issue

In support of its motion filed herewith, defendants, in accordance with Rule 9(h) of this Court submit that there is no genuine issue as to the material facts contained in the affidavit of Eugene C. Thompson, dated April 22, 1963 and the exhibits attached thereto, and the affidavit of Francis A. O'Neill, Jr., dated May 10, 1963, and the material facts contained in the statement in defendants' memorandum in opposition to plaintiff's motion for a preliminary injunction.

Order

Counsel for the National Mediation Board having informed the Court that the policy of the Board concerning ballots marked "No representation" or "No union" is to tabulate such ballots as void, and to treat such ballot as if the voter had refrained from returning a ballot at all, it appears to the Court that the following sentences, appearing on page 10 of the Court's memorandum filed May 3, 1963, should be deleted therefrom:

> If, instead of refraining to vote, the voter returns a ballot marked "No representation" or "No union," the ballot will be counted for purposes of participation, but will be tabulated as void; the voter would thus cast a ballot against the very position he seeks to support.

Therefore, it is by the Court this 10th day of May, 1963,

ORDERED That the above sentence be and the same is hereby deleted from said memorandum.

/s/ LUTHER W. YOUNGDAHL
Judge

Memorandum

On May 3, 1963, this Court granted a preliminary injunction enjoining the defendant National Mediation Board from conducting any election among the "Clerical, Office, Stores, Fleet ad Passenger Service employees" of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation. On the same date, this Court also ordered that the defendant have until May 10, 1963, to show why the preliminary injunction above granted should not be made permanent.

On May 10, 1963, the defendant filed a motion to dismiss the complaint, or in the alternative for summary judgment. On the same date, the defendant filed a response to the order to show cause, requesting the Court to reconsider and vacate the preliminary injunction above granted, or to stay the preliminary injunction and allow the Mediation Board to conduct the proposed election, and opposing the entry of a permanent injunction.

In support of its various motions, the defendant has submitted an affidavit of Francis A. O'Neill, Jr., a member of the National Mediation Board. Mr. O'Neill has repeated the Board's position as to the long-continued use of this form of ballot, and the time and expense involved in the preparation by the Board of a new list of eligible voters. Obviously, neither of these arguments is sufficient to overcome the Court's previous conclusions, stated in its memorandum of May 3, 1963, that the proposed form of ballot is illegal under the Railway Labor Act, 45 U.S.C. § 151 *et seq*, and that plaintiffs, with the balance of convenience in their favor, would be irreparably injured by the holding of the election with an illegal form of ballot.

The only argument of Mr. O'Neill's not already made by the Board, and hence not fully considered by the Court in reaching its conclusion to issue the preliminary injunction, is the following:

> In the opinion of the National Mediation Board any requirement that the ballot used in a representation dispute be changed to provide a space in which the voters can vote for no representation will tend to encourage the parties to a representation dispute to resort to self-help rather than to seek the services of the Board in resolving the representation dispute and will result in strikes and unrest in the industries covered by the Railway Labor Act which would not result were the normal form of ballot used.

Implicit in this argument is the assumption that unions will prefer to strike rather than to ask the National Mediation Board to investigate a representation dispute pursuant to 45 U.S.C. § 152, Ninth, if any election held by the Board in the course of such investigation must be by a ballot on which the voter can express a preference for no collective bargaining representation. Why unions would prefer to strike rather than engage in an election campaign culminating in a ballot on which all alternatives are clearly stated is not clear to the Court. The Board already has a policy of refusing to certify a collective bargaining representative if a majority of the eligible voters fail to return valid ballots. The Court has merely held that the ascertainment of the number of voters who prefer no collective bargaining representation must, under the Railway Labor Act, be by means of ballots on which such preference can be expressed clearly and unambiguously. Such an unambiguous procedure for ascertaining majority will is no more an invitation to strikes or "self-help" than is the Board's own present policy. In any event, if such "self-help" were to impair the Board's important functions, then it would be for the Congress to take such action as it deemed appropriate to change the Railway Labor Act.

The Board has made the further argument that the issue of whether the Railway Labor Act's provisions for ma-

jority determination of representation disputes requires a ballot on which a voter can express a preference against any such representation, is a matter properly left to the expertise of the Board, even though a question of statutory construction is obviously involved. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), upon which the Board relies for this argument, is not in point. There the dispute concerned which of two methods of financial cost accounting was required by a statute which specified neither, and the Supreme Court held that the Canal Company could determine the issue as it thought best, particularly since the President and the Congress had been fully advised of the Canal Company's method of accounting. 356 U.S. at 318-19. "[T]he question is so wide open and at large as to be left at this stage to agency discretion. The matter should be far less cloudy, much more clear for courts to intrude." *Id.* at 319. Here, by contrast with the *Panama Canal Co.* case, the issue of statutory construction goes to the very center of the complicated mediation procedures outlined at length in the Railway Labor Act, with its clear and uncloudy emphasis upon majority determination of the issue of representation. The form of ballot prescribed by the Board is a clear "mistake of law," and judicial review is thus appropriate. *Id.* at 318.

The Board has also cited to the Court certain language from the recent case of *WES Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, — U.S. App. D.C. —, 314 F.2d 234 (1962).[1] The language immediately following that

[1] "The need for a large degree of conclusiveness in the settlement of labor disputes over the question of employee representation in the transportation industry was met by Congress in the Railway Labor Act. Responsibility was given to a board with special competence, in the effort to maintain enough harmony to prevent interruption of service. Congress sought to preclude litigation in the courts over what the Supreme Court has called an 'explosive problem.' *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 303 (1943). The Court said Congress had taken 'great pains' to protect the Mediation Board in its handling of the problem. Consequently the courts have seldom intruded. [Citation of cases omitted.]" 314 F.2d at 236.

quoted by the Board, however, is more relevant to the issues now before the Court:

> Where courts have taken jurisdiction of such representation disputes the context has strongly indicated either that the Board by refusing to act had obliterated rights granted to employees by Congress or, turning now to a situation arising under the National Labor Relations Act, the Board had acted in excess of its delegated powers and contrary to a statutory provision which is "clear and mandatory." *Leedom* v. *Kyne*, 358 U.S. 184 (1958). When this occurs the courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. *WES Chapter, supra,* 314 F.2d at 236.

An election based upon use of the Board's present ballot would obliterate the right to vote for no collective bargaining representation, and would thus be contrary to the clear requirements of the Railway Labor Act's stated policy of majority determination.

Since the above points constitute the only issues raised by the Board in response to the Court's order to show cause why the preliminary injunction should not be made permanent, and since the Board in response to said order to show cause has raised no disputed issue of fact on which a trial would be necessary, the Court will deny the Board's motion to dismiss or in the alternative for summary judgment, and will issue a permanent injunction for the reasons set forth in this memorandum and in the memorandum of May 3, 1963.[2]

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[2] In reaching this conclusion, the positions advanced by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, which union has been permitted to intervene in this action pursuant to Rule 24(b), Fed. R. Civ. P., have been fully considered but have not been separately stated since they repeat, in summary form, issues fully argued by the Board and disposed of by the Court in its memorandum of May 3, 1963.

This memorandum shall be considered as specific findings of fact and conclusions of law, supplemental to the findings of fact, conclusions of law, and memorandum of May 3, 1963, which findings, conclusions, and memorandum of May 3, 1963 are hereby readopted by the Court.

/s/ LUTHER W. YOUNGDAHL
Judge

May 29, 1963

Order

The National Mediation Board having filed a motion requesting the Court to reconsider and vacate the preliminary injunction granted on May 3, 1963, or to stay the preliminary injunction and allow the Mediation Board to conduct the proposed election, or to dismiss the complaint or to grant summary judgment for the defendant thereon, and the plaintiff having requested that the said preliminary injunction be made final, and the parties having filed memoranda which have been fully considered by the Court, it is by the Court this 29th day of May, 1963, for the reasons set forth in its Findings of Fact, Conclusions of Law, and Memorandum filed on May 3, 1963, and for further reasons set forth in its memorandum filed today,

ORDERED That defendant Board's motions be and the same are hereby denied, and it is

FURTHER ORDERED That the preliminary injunction heretofore granted on May 3, 1963, be and the same is hereby made final, and it is

FURTHER ORDERED That the Board is hereby permanently enjoined from conducting any election among the "Clerical, Office, Stores, Fleet and Passenger Service employees" of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is

FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 *et seq* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation.

/s/ LUTHER W. YOUNGDAHL
Judge

Order

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, having filed on May 8, 1963, a motion for leave to intervene as a party defendant, and plaintiff having filed an opposition thereto, it appearing that said applicant for intervention on August 24, 1962, filed with the National Mediation Board an application pursuant to 45 U.S.C. § 152, Ninth, for an investigation of a representation dispute among certain employees of United Airlines, Inc., and it appearing further that said applicant for intervention is one of the two unions whose names appear on the ballot prepared by the National Mediation Board for an election scheduled to be held pursuant to 45 U.S.C. § 152, Ninth, and it appearing further that said applicant's defense and the main action have identical questions of law, it is by the Court this 29th day of May, 1963,

ORDERED That said Brotherhood be and the same is hereby permitted to intervene as a defendant in the above entitled case, pursuant to Rule 24(b), Federal Rules of Civil Procedure.

/s/ LUTHER W. YOUNGDAHL

No. 973-63

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION

ASSOCIATION FOR THE BENEFIT OF
NON-CONTRACT EMPLOYEES, *Plaintiff*

VS.

NATIONAL MEDIATION BOARD, et al., *Defendants*
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Intervening Defendant

Notice of Appeal

Notice is hereby given that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, intervening defendant, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on May 29, 1963.

MILTON KRAMER
1625 K Street, N. W.
Washington 6, D. C.

JAMES L. HIGHSAW, JR.
Tower Building
Washington 5, D. C.

Attorneys for Intervening Defendant

CIVIL No. 973-63

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Plaintiff*

vs.

NATIONAL MEDIATION BOARD, et al., *Defendants*

Notice of Appeal

Notice is hereby given this 26th day of July, 1963, that the National Mediation Board; Leverett Edwards, Francis A. O'Neil, Jr., and Howard G. Gamser, hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 29th day of May, 1963, in favor of the plaintiffs against said defendants, making permanent the preliminary injunction granted in this cause on May 3, 1963.

/s/ HOWARD SHAPIRO
Attorney for Defendants

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[fol. 175]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,777

UNITED AIR LINES, INC., Appellant,

v.

NATIONAL MEDIATION BOARD, et al., Appellees.

No. 18,068

NATIONAL MEDIATION BOARD, et al., Appellants,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

No. 18,072

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Appellant,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[fol. 176] Mr. Stuart Bernstein, with whom Mr. James Francis Reilly was on the brief, for appellant in No. 17,777.

Mr. Milton Kramer, with whom Mr. James L. Highsaw, Jr., was on the brief, for appellant in No. 18,072.

Mr. Howard E. Shapiro, Attorney, Department of Justice, with whom Assistant Attorney General Douglas, Messrs. David S. Acheson, United States Attorney, and Morton Hollander, Attorney, Department of Justice, were on the brief, for appellees in No. 17,777 and for appellants in No. 18,068.

Mr. Alex L. Arguello, of the bar of the Supreme Court of California, pro hac vice, by special leave of court, with whom Mr. Jerome C. Muys was on the brief, for appellee in No. 18,068 and No. 18,072. Mr. David Booth Beers also entered an appearance for appellee in No. 18,068 and No. 18,072.

Mr. John E. Stephen filed a brief on behalf of Air Transport Association of America, as amicus curiae, urging reversal on No. 17,777.

Mr. William G. Mahoney filed a brief on behalf of Railway Labor Executives' Association, as amicus curiae, uring affirmance in No. 17,777.

OPINION—Decided March 12, 1964

Before WILBUR K. MILLER, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM: These three appeals have been consolidated by this court. In our view Nos. 18,068 and 18,072 should be disposed of first, although they are later in their numbering.

In No. 18,068, the National Mediation Board appeals from an order issued by the District Court which, among other things, restrains the Board from conducting a representation election.

[fol. 177] In No. 18,072, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes appeals from the same order.

The order appealed from is as follows:

> ". . . ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the

form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is

"FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 et seq. gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

The opinion of Judge Youngdahl, of the District Court, is found in 218 F.Supp. 114 (1963) and is adopted by us as the opinion of this court. It follows that the judgment of the District Court in these cases must be affirmed.

In No. 17,777, United Air Lines, Inc. appeals from the dismissal by the District Court of its action filed to enjoin the election proposed by the National Mediation Board. The grounds for dismissal of the action are not stated in the court's order but, as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed. The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the Dis- [fol. 178] trict Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought.

No. 18,068 is affirmed.

No. 18,072 is affirmed.

No. 17,777 is affirmed.

WRIGHT, Circuit Judge, concurring in part and dissenting in part: In No. 17,777 of this consolidated litigation, United Air Lines appeals from the District Court's refusal to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth, of the Railway Labor Act. 48 Stat. 1188, 45 U.S.C. § 152, Ninth. In Nos. 18,068 and 18,072, the National Mediation Board and the Brotherhood of Railway and Steamship Clerks appeal from the granting of an injunction against the Board, by the same court through a different judge, restraining it from conducting the same election which is the subject of the United Air Lines suit. The second injunction action was brought[1] by certain employees of United Air Lines who claim to want to represent themselves *individually* in their labor negotiations with their employer. I agree with the court that in No. 17,777 the United Air Lines injunction proceeding was properly dismissed by the District Court. I respectfully dissent from its affirmance in Nos. 18,068 and 18,072 upholding the issuance of the injunction against the National Mediation Board.

Since the United Air Lines suit and the action brought by some of its employees appear to have a common inspiration as well as common issues, I shall treat them to-
[fol. 179] gether. Both United and its appellee employees, here called ABNE,[2] urge two grounds for enjoining the Board from performing its duty under the Act: (1) The Board improperly determined the bargaining unit craft or class to be "clerical, office, stores, fleet and passenger service employees"; and (2) the Board proposes to use in the election a form of ballot which does not provide a space for the employee to vote against representation.

The craft or class recognized by the Board as the proper bargaining unit for the proposed election is the same as that recognized in its 1947 proceeding. Case No. R-1706, Determinations of Craft or Class of the National Mediation Board (1947). There has been no change in the classification since that time. After considering the

[1] The employees' action was brought after United Air Lines' application for an injunction was denied.

[2] Association for the Benefit of Non-Contract Employees.

representations by United as to the need for change, the Board determined that it would follow its prior ruling. Thus United and ABNE would have the court reweigh these class considerations and substitute its judgment for the Board's.

With reference to the form of ballot, space is provided to vote for either of the competing unions.[3] A third blank space is indicated for voting for a representative not named on the ballot. That same blank space may be used for voting for "no union" or "no representation." Section 2, Fourth,[4] of the Railway Labor Act provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Thus, if a majority of the craft or class actually votes for representation, a representative may be selected. [fol. 180] If a majority fails to vote, the Board may not certify a representative. *Radio Officers' Union* v. *National Mediation Board,* 86 U.S. App. D.C. 319, 181 F.2d 801 (1950). In addition, the admitted practice of the Board is to add the number voting "no union" to the number not voting in determining whether a majority of the employees eligible to vote actually voted for representation.

The District Court's action enjoining the Board from conducting the election here is in the teeth of a host of cases from the Supreme Court, from this court, and from the Circuit Courts around the country. In the interest of economy, I shall simply list *seriatim* the reasons why this injunction should not have been issued and briefly comment on each.

1. The District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943). In upholding the action of the Board

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[3] The two competing unions shown on the ballot were the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists.

[4] 48 Stat. 1187, 45 U.S.C. § 152, Fourth.

against union attack, the Court in *Switchmen's Union* said, "* * * if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain." 320 U.S. at 303. (Emphasis added.) Unlike the National Labor Relations Act,[5] the Railway Labor Act has no provision for judicial review. *Switchmen's Union* was reinforced by three other cases[6] handed down by the Supreme Court [fol. 181] at the same term, and the force of these decisions has continued, unmodified by Congress, down to the present day.[7]

2. The ballot which the District Court has ordered changed before an election can be conducted has been used by the Board and its predecessor, the Railway Labor Board, since 1921 in over 3,400 elections. In the 43 years since 1921, Congress has not indicated the slightest

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[5] 49 Stat. 453, 29 U.S.C. § 159(d).

[6] *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); and *Brotherhood of Railway & Steamship Clerks, etc.* v. *United Transport Service Employees*, 320 U.S. 715 (1943) (*per curiam*).

[7] *Order of Railway Conductors* v. *National Mediation Bd.*, 79 U.S.App.D.C. 1, 141 F.2d 366, *cert. dismissed*, 323 U.S. 166 (1944); *Radio Officers' Union* v. *National Mediation Board*, *supra*; *Rutas Aereas Nacionales, S.A.* v. *Edwards*, 100 U.S.App.D.C. 366, 244 F.2d 784 (1957); *Decker* v. *Venezolana*, 103 U.S.App.D.C. 301, 258 F.2d 153 (1958); *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, 111 U.S.App.D.C. 126, 294 F.2d 910 (1961), *cert. denied*, 369 U.S. 810 (1962); *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, 111 U.S.App.D.C. 121, 294 F.2d 905 (1961), *cert. denied*, 368 U.S. 956 (1962); *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, 114 U.S.App.D.C. 229, 314 F.2d 234 (1962). Among decisions from other courts are *Brotherhood of Ry. & S. Clerks, etc.* v. *Virginian Ry. Co.*, 4 Cir., 125 F.2d 853 (1942); *Rose* v. *Brotherhood of Railway and Steamships Clks.*, 4 Cir., 181 F.2d 944, *cert. denied*, 340 U.S. 851 (1950); *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 2 Cir., 311 F.2d 745, *cert. denied*, 373 U.S. 924 (1963); *Ruby* v. *American Airlines, Inc.*, 2 Cir., 323 F.2d 248 (1963), *cert. pending*.

disapproval of the Board's election machinery—including its ballot. Moreover, no court, except the District Court here,[8] in the ABNE case but *not* in the United case, has found this ballot unlawful.[9] And this court has approved its use as a proper exercise of the Board's discretion within the intendment of the Act. *Decker* v. *Venezolana, supra* Note 7 (see briefs).[10]

[fol. 182] 3. The Board's craft or class determination is unreviewable. This court has so held in at least four cases, one at the last term of court. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7; *Radio Officers' Union* v. *National Mediation Board, supra.* The Fourth Circuit, in *Rose* v. *Brotherhood of Railway and Steamship Clks., supra* Note 7, 181 F.2d at 946, summed it up well:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute

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[8] The ABNE and United Cases were heard by different District Court judges.

[9] But *cf. McNulty* v. *National Mediation Board,* N.D.N.Y., 18 F.Supp. 494 (1936).

[10] The *Decker* case involved the jurisdiction of the District Court to review the action of the Mediation Board. Paragraph 8 of the amended complaint there raised the same issue which is raised here:

> "[Due process was denied] in that the ballot used in the election had no space on it for a vote to the effect that the employee did not want anyone, defendant I.A.M. or anyone else, to represent him."

That issue was preserved on appeal, in paragraph 1b of the Questions Presented:

> "* * * the right to [due process] was denied by use of a ballot which gave no way to vote against representation by any bargaining agent."

Affirming the dismissal of the complaint, this court stated, "We hold that the prohibition of the Switchmen's case applies in the circumstances of this case." 103 U.S.App.D.C. at 302, 258 F.2d at 154.

was to vest in the Mediation Board exclusive jurisdiction over the *certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining.* And it is equally clear that the *exercise of discretion by the board with respect to such matters is not subject to review by the courts.* * * * " (Emphasis added.)

4. United Air Lines lacks standing to challenge the [fol. 183] Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, "to put an end to the harmful consequences of * * *, individual dealing between large carriers and small employees. *Machinists* v. *Street,* 367 U.S. 740, 760; *Virginian Ry.* v. *Federation,* 300 U.S. 515, 553; *Texas & N.O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U.S. 548, 570." United's obligation under the Act is *not "to interfere in any way with the organization of its employees."* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation designed to block or delay representation elections conducted by the National Mediation Board.

5. There is no *Leedom* v. *Kyne,* 358 U.S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom.* This principle has been expounded recently by this court in a series of cases so there should be no doubt about its application. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7. In the *UNA* case we said (111 U.S.App.D.C. at 124, 294 F.2d at 908):

"Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in Leedom v. Kyne, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210.

We cannot agree. In Leedom the Supreme Court carefully differentiated Switchmen's Union from the case before it, pointing out that the latter did not involve 'review' of agency action, but the striking down of action *in excess of delegated powers, in flat violation of the controlling statute*—there the Labor Man-
[fol. 184] agement Relations Act, 29 U.S.C.A. § 141 et seq. See 358 U.S. at pages 188-190, 79 S.Ct. at pages 183-184. It should be noted, also, that in Leedom v. Kyne the National Labor Relations Board *did not deny* that it had contravened its governing statute. See 358 U.S. at page 187, 79 S.Ct. at page 183. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. * * * " (Emphasis added.)

6. There is a demonstrable lack of equity in the application for the injunction against holding the election. ABNE, the no-contract employees' group, claims it represents more than half of the employees eligible to vote in the election. If so, its remedy is to tell its members either not to vote or to vote for no representation. As shown, if its membership complies with these instructions, there will not be a majority voting for representation and, consequently, no representative will be certified. As indicated during oral argument, this was precisely the result of the voting—or not voting—in the representation election held recently at Lake Central Airlines. No irreparable injury is shown, therefore, if the election here is conducted as ordered by the Board.

This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. See, *e.g., Adair* v. *United States,* 208 U.S. 161 (1908); *Adkins* v. *Children's Hospital,* 261 U.S. 525 (1923). I thought those days were over.

I regret my inability to agree with my distinguished brethren in respect to this litigation. Respectfully I dissent from the court's ruling upholding this injunction.

[fol. 185] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil 402-63

No. 17,777

UNITED AIR LINES, INC., Appellant,

v.

NATIONAL MEDIATION BOARD, et al., Appellees.

Civil 973-63

No. 18,068

NATIONAL MEDIATION BOARD, et al., Appellants,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

Civil 973-63

No. 18,072

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Appellant,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Bastian and Wright, Circuit Judges.

JUDGMENT—March 12, 1964

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court:

(1) that the judgment of the District Court on appeal in cases Nos. 18,068 and 18,072 is hereby affirmed; and

(2) that the judgment of the District Court on appeal in case No. 17,777 is also affirmed.

Per Curiam.

Dated: March 12, 1964.

Separate opinion by Circuit Judge Wright concurring in affirmance in case No. 17,777 and dissenting from affirmance in cases Nos. 18,068 and 18,072.

[fol. 188] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 189]

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1963

NATIONAL MEDIATION BOARD, et al., Petitioners,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 10, 1964

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 10th, 1964.

Earl Warren, Chief Justice of the United States.

Dated this 10th day of June, 1964.

[fol. 190]

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1964

NATIONAL MEDIATION BOARD, et al., Petitioners,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 29, 1964

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including August 10th, 1964.

Earl Warren, Chief Justice of the United States.

Dated this 29th day of June, 1964.

[fol. 191]

SUPREME COURT OF THE UNITED STATES

No. 138, October Term, 1964

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Petitioner,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 139 and 369 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 192]

SUPREME COURT OF THE UNITED STATES

No. 369, October Term, 1964

NATIONAL MEDIATION BOARD, et al., Petitioners,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 138 and 139 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 139

UNITED AIR LINES, INC., PETITIONER,

vs.

NATIONAL MEDIATION BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 1, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

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JOINT APPENDIX.

Civil Docket.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

United Air Lines, Inc.
vs.
National Mediation Board; Leverett Edwards, Individually and as Chairman of the National Mediation Board; Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board

Number 402-63, Action for Injunction.

Attorneys:

James Francis Reilly, 1625 K St., N. W.

John W. Douglas, Donald B. MacGuineas, Harlan F. Leathers, Richard S. Beatty, Dept. of Justice.

1963		
Feb. 12	Complaint, appearance	filed
Feb. 12	Summons, copies (5) and copies (5) of Complaint issued D. A. Ser. 2-13-63 A. G. Ser. 2-14-63 (#1, 2, 3 Ser. 2-13-63).	
Feb. 21	Motion of pltf for preliminary injunction; P&A; affidavits (3); c/m 2/21/63; MC 2/21/63. Exhibits A thru V.	filed
Mar. 8	Opposition of defts to motion for preliminary injunction; P & A; c/m 3-8-63. App. John W. Douglas, Donald B. MacGuineas, Harlan F. Leathers and Richard S. Beatty.	filed

Mar. 8 Motion of defts to dismiss or for summary judgment; P & A; Statement; Exhibits 1-11; Affidavit; c/m 3-5-63. M. C. filed

Mar. 18 Supplemental affidavit of Charles M. Mason in support of pltf's motion for preliminary injunction; exhibits A & B. filed

Mar. 18 Opposition of pltf to motion to dismiss or for summary judgment; c/m 3/18/63. filed

Mar. 21 Reply memorandum of defts in support of motion to dismiss or for summary judgment; affidavit; c/m 3/21/63. filed

Mar. 25 Order granting motion of defts for summary judgment; dismissing complaint with prejudice; and, dismissing motion for preliminary injunction as moot. (N) Matthews, J.

Mar. 27 Notice of appeal by pltf from order 3/25/63. Deposit by Reilly $5.00. Copy mailed to H. Leathers. filed

Apr. 2 Cost bond on appeal in sum of $250.00 with Hartford Accident & Indemnity Co., approved. (fiat) Jones, J.

Apr. 12 Record on appeal delivered to USCA forthwith. Deposit by Reilly $.95.

Apr. 12 Receipt from USCA for original papers. filed

Apr. 12 Order directing Clerk to transmit entire original file to USCA forthwith. (N) Micro 4/10/63 Matthews, J.

IN THE UNITED STATES DISTRICT COURT
For the District of Columbia

United Air Lines, Inc., O'Hare International Airport, P. O. Box 8800, Chicago 66, Illinois,
Plaintiff.

v.

National Mediation Board; Leverett Edwards, Individually and as Chairman of the National Mediation Board; Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board, 1230 Sixteenth Street, N. W., Washington, D. C.
Defendants.

Civil Action, No. 402-63.

Complaint for Injunction.

Plaintiff, United Air Lines, Inc., by its attorneys, complains of defendants as follows:

1. This action arises under the Constitution of the United States and the Railway Labor Act (the "Act"), 45 U. S. C. § 151 et seq. Plaintiff seeks to enjoin defendants from (1) proceeding with a representation election under that Act among certain employees of plaintiff, or issuing any certification with respect thereto, unless and until defendants accord plaintiff the right to be heard as a party in interest on the appropriateness of the craft or class with respect to which such election will be held, and (2) conducting any such election with a form of ballot which does not allow an eligible employee to cast a vote against representation. The matter in controversy exceeds the sum of $10,000, exclusive of interest and costs. Federal jurisdiction is based on 28 U. S. C. §§ 1331 and 1337.

Count I.

2. Plaintiff is a corporation organized and existing under the laws of the State of Delaware and is a common carrier by air engaged in scheduled interstate air transportation within the continental limits of the United States, overseas to Hawaii, and internationally to Canada.

3. Defendant National Mediation Board (the "Board") is an agency of the United States Government established under the Act. Defendants Edwards and O'Neill are chairman and member, respectively, of the Board. All defendants are located within the District of Columbia.

4. The Act, which is applicable to air and rail carriers, provides that employees of a carrier shall have the right to organize and bargain collectively through representatives of their own choosing, and that the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class. (Section 2, Fourth; 45 U. S. C. § 152, Fourth.) In the event of a dispute as to who are the representatives of the carrier's employees, the Board has the duty to investigate such dispute upon the request of either party to the dispute and to certify the names of the individuals or organizations authorized to represent the employees in the dispute. The carrier is then required to treat with such representative for the craft or class. (Section 2, Ninth; 45 U. S. C. § 152, Ninth.)

5. On or about August 24, 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (the "Brotherhood"), a labor organization within the meaning of the Act, invoked the services of the Board under the provisions of Section 2, Ninth of the Act to investigate an alleged representation dispute among a group of employees of plaintiff described as the clerical, office, stores, fleet, and passenger service

employees, excluding certain stores and fleet service employees now represented by another labor organization, the International Association of Machinists (the "IAM"). The Board docketed the case as R-3590. After the IAM protested the grouping of employees described by the Brotherhood, the Brotherhood amended its application to describe the group of employees as the clerical, office, stores, fleet and passenger service employees, without any exclusions. The IAM and Brotherhood are recognized by the Board as parties in interest in R-3590.

6. The composition of a craft or class of employees for collective bargaining purposes affects valuable property rights of plaintiff in the conduct of its business. The craft or class the Brotherhood seeks to represent in Case R-3590 numbers approximately 12,700 employees of plaintiff. These employees perform work in many different and unrelated classifications, such as electronic computer operators, ticket agents, and cleaning women. The combining of these employees in a single craft or class for collective bargaining purposes will have a substantial and adverse impact on the operations and cost of conducting plaintiff's business.

7. Shortly after plaintiff was notified by the Board of its intention to conduct an election among the clerical, office, stores, fleet and passenger service employees of plaintiff, plaintiff requested the Board to conduct a hearing to determine the appropriateness of this grouping, and to permit plaintiff to participate in such hearing as a party in interest. This request was denied. The Board stated, in effect, that it would have conducted such a hearing if either labor organization involved had so requested, but that plaintiff as a carrier had no legal right to be heard or to demand a hearing on a craft or class question. Neither of the labor organizations involved requested such a hearing and accordingly, the Board, unless enjoined, will pro-

ceed with an election among plaintiff's employees in the grouping described in the Brotherhood's application as amended.

8. Plaintiff has a constitutional right to a hearing on the question of the composition of the craft or class of its employees with respect to which it may be required to bargain collectively with a majority representative. The action of the Board in denying plaintiff this right, and in arbitrarily and capriciously accepting the craft or class designation as agreed upon between the labor organizations involved without any hearing on or consideration of its effect upon plaintiff, constitutes a violation of plaintiff's constitutional right to due process under the Fifth Amendment to the United States Constitution.

9. If the Board should proceed with an election among the grouping of employees described in the application of Brotherhood, as amended, in Case R-3590, and if the Board should certify a representative for such grouping, plaintiff will be under a statutory duty to bargain collectively with such representative, and may be subject to criminal penalties under the Act if it refuses to do so. There is no statutory procedure for judicial review of Board proceedings. Therefore, plaintiff has no adequate remedy at law to vindicate its constitutional right to due process. Plaintiff will suffer irreparable injury to its business and property unless the Board is restrained from holding such election, or certifying such representative, without first according to plaintiff the due process to which it is entitled.

Count II.

10. Paragraphs 2, 3, 4 and 5 of Count I of this Complaint are hereby realleged and made a part of this Count II.

11. The Board intends to proceed with an election among the approximately 12,700 employees of plaintiff in

the grouping described in the application of the Brotherhood, as amended, in Case R-3590.

12. The procedures which the Board has stated it will follow in such election contravene the requirement of the Act that the majority of the employees in the craft or class shall have the right to elect a representative for the craft or class. The ballot which the Board intends to use in such election does not allow an eligible employee to cast a valid vote against representation, a right implicit in the provisions of the Act and clearly intended by Congress. Thus an employee who desires no representation can only express his intention by refusing to participate in the election.

13. The Board has stated that an election is valid if a majority of the eligible voters in the craft or class cast valid ballots. A majority of the valid ballots cast is deemed sufficient to elect a representative. A ballot is considered valid by the Board only if cast for a representative. A ballot upon which is written "no representative" or which is cast blank is not considered valid.

14. The Board procedures thus make it possible for a minority of eligible employees to elect a representative for the entire craft or class, contrary to the desires of the majority. For example: if of 13 employees eligible to participate in an election, six desire no representation at all, three desire Union A but no other union, and four desire Union B, there is no possible way under Board procedures for the six to cast a valid ballot; the remaining seven voters will then determine the election, being a majority of the 13 eligible employees, and the four votes for Union B will carry the election, being a majority of the seven. If the ballot included space for a vote against representation, as does the ballot used by the National Labor Relations Board under its procedures, then under the same example Union B would not have a majority and on a

run-off the vote would be four votes for Union B and nine votes for no representation.

15. Plaintiff has requested the Board to use a form of ballot which would permit an employee to cast a valid vote for or against representation in order to insure an accurate expression of the employees' desires, but the Board has refused to modify the form of ballot it intends to use.

16. The requirement that an employer bargain collectively with its employees is a limitation on its right to otherwise conduct its business free of restraint. It has been judicially determined that it is not an unreasonable restraint to legally require such bargaining with the true representative of a majority of employees for all employees in the bargaining group, including the dissenting or disinterested minority. The Act imposes only this limited duty. It is an unreasonable restraint on such right to require an employer to bargain with a representative on behalf of all employees in a bargaining group when the majority of employees in that group do not desire such representation.

17. The election procedures of the Board enlarge upon the limited statutory duty imposed on a carrier by the Act to treat with a representative determined by a majority of the employees in the craft or class and are therefore beyond the scope of the Board's statutory powers. The Board procedures impose an unreasonable restraint on the right of plaintiff to conduct its business since they do not insure that plaintiff will be required to deal only with a true representative of the the majority of employees within the craft or class. Hence these procedures constitute a deprivation of plaintiff's property rights without due process in contravention of the Fifth Amendment to the United States Constitution.

18. If the Board should proceed with an election with the form of ballot it has stated it intends to use and if a

representative is certified as a result of such election, it will be impossible to determine after such election whether the representative is the true representative of the majority of employees in the craft or class for which the election is held. If the representative receives a majority of the votes cast, but less than a majority of the total number eligible to vote in the election, then it will be impossible to determine whether the employees not voting did not vote because they desired no representative or whether they were indifferent. If the representative receives a majority of the total number eligible to vote in the election, then it will be impossible to determine what influence the form of ballot itself had on the voting of the employees who did participate and found themselves unable to vote against representation.

19. If the Board should proceed with an election in Case R-3590 with the form of ballot it intends to use and should the Board certify a representative as a result of such election, plaintiff will be under a statutory duty to bargain collectively with such representative, and may be subject to criminal penalties under the Act if it refuses to do so. There is no statutory procedure for judicial review of Board proceedings. Therefore, plaintiff has no adequate remedy at law to vindicate its constitutional right to due process or to redress the unauthorized acts of the Board. Plaintiff will suffer irreparable injury to its business and property unless the Board is restrained from holding such election without using a form of ballot which permits an employee to vote against representation.

WHEREFORE, Plaintiff prays that the Court issue a preliminary injunction to be made permanent upon final hearing:

A. Restraining defendants from conducting any election among plaintiff's employees, or certifying any representative with respect thereto, pursuant to Board Case

R-3590, or pursuant to any other proceeding before the Board, without first conducting a hearing and according plaintiff an opportunity to be heard as a party in interest on any question relating to the appropriateness of the craft or class of employees among whom any such election is to be held;

B. Restraining defendants from conducting any election among plaintiff's employees in any craft or class in which the form of ballot does not permit an eligible employee to cast a valid ballot against representation.

Plaintiff further prays for such other and further relief as this Court shall deem just and proper.

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Of Counsel.

IN THE UNITED STATES DISTRICT COURT
For The District of Columbia

(Caption)

Motion for Preliminary Injunction.

Now Comes United Air Lines, Inc., plaintiff herein, by its attorneys, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, moves the Court to enter a preliminary injunction, and states in support thereof as follows:

1. Plaintiff's verified complaint for injunctive and other relief, was filed herein on February 12, 1963.

2. As more fully appears from the affidavits filed herewith of Charles M. Mason, C. P. Hutchens and David S. Ritner and said verified complaint, defendants will proceed to hold an election among a group of plaintiff's employees before trial can be had, in violation of plaintiff's statutory and constitutional rights, and to plaintiff's irreparable injury.

Wherefore plaintiff moves the Court to enter a preliminary injunction:

A. Restraining defendants from conducting any election among plaintiff's employees, or certifying any representative with respect thereto, pursuant to National Mediation Board Case R-3590, or pursuant to any other proceeding before the National Mediation Board, without first conducting a hearing and according plaintiff an opportunity to be heard as a party in interest on any question relating to the appropriatess of the craft or class of employees among whom any such election is to be held;

B. Restraining defendants from conducting any election among plaintiff's employees in any craft or class in which the form of ballot does not permit an eligible employee to cast a valid ballot against representation.

Pursuant to Rule 9(b) of the Rules of this Court, plaintiff requests oral hearing on this motion.

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Of Counsel.

IN THE UNITED STATES DISTRICT COURT.
For the District of Columbia

(Caption)

Affidavits of Charles M. Mason,
C. P. Hutchens and Davis S. Ritner

In Support of Plaintiff's Motion
For Preliminary Injunction

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Of Counsel.

Affidavit

CHARLES M. MASON, being first duly sworn, on oath deposes and says:

1. I am Senior Vice President, Personnel, United Air Lines, Inc. ("United").

2. United is a corporation organized and existing under the laws of the State of Delaware and is a common carrier by air engaged in scheduled air transportation within the continental limits of the United States, overseas to Hawaii, and internationally to Canada, and is subject to the provisions of the Railway Labor Act ("Act") and the Federal Aviation Act.

3. On August 24, 1962, The Brotherhood of Railway and Steampship Clerks, Freight Handlers, Express and Station Employees ("Brotherhood"), a labor organization and representative within the meaning of Section 1, Sixth of the Act, invoked the services of the National Mediation Board ("Board") to investigate pursuant to Section 2, Ninth of the Act a representation dispute alleged to exist among certain United employees. The case was docketed by the Board as R-3590. The employees designated by the Brotherhood as involved in the dispute were described as follows:

> "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes."

By letter dated August 27, 1962, Mr. George M. Harrison, Grand President of the Brotherhood, requested the Board to permit former employees of Capital Air Lines, even though excluded from the "craft or class" designation,

to participate in the election. A copy of this letter is attached hereto as Exhibit A.

4. On August 30, 1962, the Board advised me of the Brotherhood's application and requested me to furnish the total number of employees involved. A copy of the Board's letter is attached hereto as Exhibit B. My reply dated September 7, 1962, is attached hereto as Exhibit C. My letter dated November 2, 1962, furnishing the information requested by the Board is attached hereto as Exhibit D. On September 11, 1962, Mr. A. J. Hayes, International President, International Association of Machinists ("IAM"), advised the Board that the craft or class of employees designated by the Brotherhood did not conform to prior Board determinations of craft or class. A copy of Mr. Hayes' letter is attached hereto as Exhibit E. The Brotherhood's original application would have excluded from the group for which certification was sought all United employees represented as of August 24, 1962, by the IAM. On August 29, 1962, the Brotherhood advised the Board that it meant by its original application to exclude only incumbent United employees represented by the IAM under agreements effective on or prior to August 24, 1962, but that employees represented by IAM by virtue of any agreement entered into with United after August 24, 1962, were to be included. A copy of Mr. Harrison's letter is attached hereto as Exhibit F. On October 5, 1962, the Brotherhood amended its original statement of the craft or class to substitute a comprehensive group of United employees described as "clerical, office, stores, fleet and passenger service employees" without exclusion of employees represented by the IAM. A copy of the Brotherhood's letter of amendment is attached hereto as Exhibit G.

5. This comprehensive group numbers approximately 12,700 employees, or more than one-third of a total work force at United of approximately 32,000 employees. It in-

clude employees performing such varied work as (1) office and clerical (approximately 4,500), (2) ramp and stores (approximately 3,050), and (3) public contact work, including sales, reservation, and ticket agent work (approximately 5,100). Their salary range is $280 to $730 per month. Of the 12,700 employees involved, the approximately 3,050 ramp and store employees are currently represented for bargaining purposes by the IAM, and have been so represented since 1948. The remainder, or approximately 9,700, are not now represented at United by a labor organization, and never have been.

6. By letter dated October 8, 1962 (Exhibit H attached hereto) and addressed to Mr. Harrison, a copy of which I received, the Board requested me to furnish on behalf of United the number of employees in the amended "craft or class" sought to be represented by the Brotherhood. I concluded from this that the Board had adopted the Brotherhood's amendment of the "craft or class" and would proceed with its investigation of the alleged representation dispute among the 12,700 United employees involved. Attached hereto as Exhibits I and J, respectively, are copies of Mr. Hayes' letter to the Board dated October 23, 1962, and Mr. Harrison's letter to the Board dated October 26, 1962, which relate to allegations of inter-union raiding.

7. The "craft or class" of United employees in which the Board will proceed with an election to select a bargaining representative is completely inconsistent with United's organizational structure which is based upon classification by job function. There is a wide variance in job duties within the "craft or class." The employees are distributed in entirely different departments of the company, and share no identity of bargaining interest. Functionally, they are divided as follows:

1. Office and clerical employees.

2. Public contact employees.
3. Ramp and stores employees.

Entirely apart from the operational and organizational problems with which United will be faced in attempting to administer conglomerate categories of employees as a single unit, United will also be faced with the formidable problem of attempting to reach labor agreement with a single representative bargaining for employees with varying duties, interests and working conditions. In my judgment, this will result in substantial and continuing impairment of United's ability to avoid labor disputes.

8. For these reasons I urged the Board, by letter dated January 11, 1963, to hold a public hearing at which United could offer evidence bearing on the craft or class question. A copy of my letter is attached hereto as Exhibit K. I stated:

> "We wish to point out to the Board that the group of employees covered in the representation application filed in the above case does not coincide, either in its original or amended form, with any currently applicable craft or class determination. Further, there are distinguishing features between the members of the heterogeneous group of employees involved in this application which the Board has not had the opportunity to fully consider in any prior proceedings. At a public hearing, the Board will learn of the wide variances in the training, skills and responsibilities of the employees, of the absence of cross-training and cross-utilization between them, and of the absence of a community of interest, for example, between the highly skilled office employees and the janitorial and cleaning employees. The lack of unanimity in the air transport industry in general and on United in particular with reference to the organization of operations, the selection, training, use, representation and lack of permanency in respect to these factors in this dynamic and rapidly changing industry can and should be considered by the Board."

I pointed out to the Board that the "craft or class" of clerical, office, stores, fleet and passenger service employees was established by the Board in 1946 (Case No. R-1706) at a time when the Board had no knowledge of the changes that would and did later occur in the air transport industry. I stated:

> "In 1946, in R-1706, the Mediation Board was asked to establish for the first time on an airline a craft or class grouping of employees ranging from what the Board referred to as janitors and laborers to the highest type of technical office employees. The Board attempted in that case to establish a mold to apply to all airlines in the future. Since most of the employees in this heterogeneous grouping were unorganized at the time in the air transport industry, the Board was forced to treat with the important subject of craft or class in somewhat of a vacuum with the 'hope' that its prospective determination would provide a basis for stable labor relations in the *future* on *airlines* only because such a craft had been found to provide such a basis in the *past* on *railroads*. Although the Board did avoid a multiplicity of crafts or classes by its determination in R-1706, the Board simply did not have knowledge at the time of its decision (January 31, 1947) of the changes that would and did later occur in the air transport industry."

9. By letter dated January 17, 1963, the Board turned down my request for a hearing, stating:

> "The various comments made in the remainder of your letter of January 11, 1963 have been given careful consideration by the Board. The Board wishes to call your attention, first, to the fact that the carrier is not a party to this representation dispute. Secondly, no request for a review of the craft or class established by the Board's determination in Case No. R-1706, et al has been received from either organization party to NMB Case No. R-3590. The request contained in your letter of January 11, 1963, is not timely made, since

the Board, on December 19, 1962, found that a representation dispute existed among the employees in this craft or class, and has authorized an election.

"For the above reasons, the Board must deny your request of January 11, 1963 for a public hearing on the subject of a review of the determination made in Case No. R-1706, et al."

A copy of this letter is attached hereto as Exhibit L.

10. On January 25, 1963, I again wrote the Board to urge that it conduct a public hearing to establish the proper craft or class at United and "determine, in light of the lapse of 15 years, and the other factors set out in our letter of January 11, whether the R-1706 determination was still a proper grouping." I stated:

"Finally, the imposition by the Board of an inappropriate railroad craft or class upon 12,700 employees of this dynamic and changing air transportation industry is illogical. The 'clerical, office, station, and storehouse employees craft or class' grew up out of the historical development of the railroad industry. To say that a craft or class springing from the history of the then static and now declining railroad industry should be forcibly imposed on the airline industry, which has an entirely different history and is still growing, is illogical and improper. If the Board restricts air carriers to railroad rigidity, United will not be able to discharge fully the obligation imposed upon it by Congress through the Federal Aviation Act to provide efficient and economical service at reasonable charges to the public. In fact, my personal observations of the operations and organization of Capital Air Lines before Capital had to be merged into United or face bankruptcy convinced me that part of Capital's difficulties resulted from the Board's action in 1947 in forcing a vast and heterogeneous group of employees into a single craft or class because that craft or class had been satisfactory on railroads in the past and the Board 'hoped' it would be in the future on airlines."

A copy of this letter is attached hereto as Exhibit M. On February 4, 1963, the Board rejected my renewed request for a hearing. A copy of the Board's letter is attached hereto as Exhibit N.

11. On January 18, 1963, I protested the form of ballot which the Board intended to use in the election among the United employees. A copy of this letter is attached hereto as Exhibit O. The Board form of ballot, a specimen of which is attached at Exhibit P, contains no space to permit an eligible employee to vote against representation, but on the contrary requires the employee to select one of the organizations listed on the ballot, except that a blank line is provided for writing in any other organization or individual desired by the voter to represent him. Thus, the ballot *requires* the employee to select a representative despite the possibility that the voter may desire no representation at all. I advised the Board that the applicable legislative history of the Railway Labor Act, as well as authority addressed to the specific question of the propriety of this form of ballot, indicated that such form of ballot was improper. I urged the Board to revise its election procedures "so that our employees and employees of other carriers in future elections will have an opportunity to express their decision on all of the choices that are available to them, one of which is to remain unrepresented." On January 22, 1963, Mr. William A. Patterson, President of United, wrote to the Board urging a review of its election procedures with respect to the form of ballot used. Mr. Patterson stated:

> "As I understand it, the ballot furnished to the employees by the National Mediation Board plainly states that purpose of the election is for the employees to designate a union to represent them—not whether they want a union and, if they do, which one. Also the ballot has on it only the name of the one or more unions desiring to represent the employees and a blank space

for the employees to vote for some other organization or individual not named on the ballot. This certainly leaves the employee with the inference that he has no choice but to vote *for* some union to represent him. Additionally, the Mediation Board does not tell the employee at any time how to express his choice if he wishes to remain unrepresented by a union."

A copy of this letter is attached hereto as Exhibit Q.

12. On January 24, 1963, the Board replied to my letter which had objected to the form of ballot. A copy of this letter is attached hereto as Exhibit R. After stating that the Board "has consistently held [,] a carrier is not a party to a representation dispute involving the selection of a representative of its employees," the Board summarized its election practices as follows:

> "As you state in your letter, the form of ballot previously used was adopted by the Board in 1934 and has been used since that time as the form best designed to ascertain the representation desires of a carrier's employees for the purpose of collective bargaining. The blank line appearing on the present form of ballot affords an opportunity to the voter to vote for some organization or individual other than those named on the ballot, or he may refrain from voting at all if he so chooses. There is no compulsion that he vote for a contestant for representation. Introduction of a 'yes' or 'no' ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees for the purposes described in Section 2, First and Second of the Railway Labor Act, . . ."

13. On February 1, 1963, I wrote in reply to the Board's letter on January 24, 1963, and renewed my plea that the Board review its election procedures with reference to the form of ballot. A copy of this letter is attached hereto as Exhibit S. The Board denied my request by letter dated

February 7, 1963, a copy of which is attached hereto as Exhibit T, and stated, "The Board will proceed with an election among the employees concerned in NMB Case No. R-3590 under the Board's usual policies and procedures in such cases."

14. On January 25, 1963, the Board issued a "Statement" in response to a "large number of telegrams and letters from individuals and groups signing themselves as employees of United" summarizing the Board's reasons for denying a craft or class hearing requested by United, and for rejecting United's request that the form of ballot be altered. A copy of this statement is attached hereto as Exhibit U. It states:

> "This craft or class was found by this Board in Case No. R-1706 et al. to be the appropriate grouping of these employees for representation purposes under Section 2, Ninth of the Railway Labor Act. Case No. R-3590 is being investigated on that basis. The parties to this dispute are the Brotherhood of Railway & Steamship Clerks, who invoked the Board's services, and the International Association of Machinists, AFL-CIO, which organization now represents the Stores, Ramp and Fleet Service Employees of United, also a number of employees performing janitorial service. United Air Lines, Inc. is not, and cannot be, a party to this representation dispute.
>
> "On September 7, 1962, and January 11, 1963, United Air Lines requested this Board to hold a hearing to establish the proper crafts or classes on United which are involved in this dispute. The Board, on January 17, 1963 replied to United, pointing out the fact that the carrier is not a party to this matter, and also pointing out that neither of the organizations who are parties to this case have made any request for a hearing on the question of craft or class. The Board, therefore, denied the request of United for such a hearing.
>
> "On January 18, 1963 United Air Lines protested the form of ballot customarily used by this Board, and re-

quested that the Board revise its election procedures so that the ballot would contain a space for a vote for no representation. The Board on January 24, 1963 replied to United calling attention to the fact that the Board's present form of ballot, adopted in 1934, was designed to ascertain the representation desires of a carrier's employees for collective bargaining under the Railway Labor Act. The Board's standard form of ballot carries lines for voting for the contesting parties, and a blank line on which a voter may vote for some organization or individual other than those named on the ballot. There is no compulsion that he vote for a contestant for representation."

15. In elections conducted under the Board's auspices, a majority of the eligible voters *participating* in the election, and not the majority of the *voters eligible*, decides the outcome of the election. In order for an election to be valid, however, a majority of the eligible voters must participate. An eligible voter who refrains from voting in order to effectuate a desire that he remain unrepresented disenfranchises himself to no purpose since a majority of those voting will determine the result. Only if a majority of the eligible voters do not cast votes will such disenfranchisement have any effect. A voter who marks "no union" or "no representation" on the ballot also disenfranchises himself to no purpose for the reason that the Board considers such ballot void and as though not cast. The Board's instructions to the employees at the time of the election make no reference to these rules. The employee is advised that the ballot is being taken "in order to ascertain and to certify" a representative and is told only how to vote *for* a representative. See Exhibit P.

16. Under the National Labor Relations Act, as amended (NLRA), the practices with regard to representation of employees differ from the practices followed by the Board both with respect to employer participation in

hearings and the form of ballot. Under the NLRA an employer is accorded party status to a hearing (required by the NLRA) addressed to the scope of the bargaining unit. With respect to the form of ballot, the National Labor Relations Board provides a space on the ballot to enable an eligible voter to vote against representation, should he so desire. A specimen form of ballot used by the National Labor Relations Board is attached hereto as Exhibit V.

17. In paragraph 7 of this Affidavit I have set forth the facts with respect to the impact of an inappropriate craft or class determination upon United's administrative system. Additionally, however, it is my judgment that the representation by a single organization of heterogeneous groups is neither practical nor productive of harmonious labor relations. The following examples will suffice:

(a) Seniority provisions often permit inter-group promotion, assignment and displacement. If seniority is on a company-wide basis, an employee in one group can exercise seniority to fill vacancies in another group resulting from promotion, reassignment, lay-off or increase in the work force. Although an employee may have the minimum ability to perform the job in another group to which seniority entitles him, expensive on-the-job training is required to fit him for the particular duties involved. More specifically, seniority will often entitle an employee hired for clerical or ramp and store work to demand work in the public contact group for which his or her training and personality are inadequate. This will result in reduction of quality of service to the public, and therefore the sales, of the carrier.

(b) In a single craft or class which embraces separate groups, the tendency of the bargaining representative is to favor, with respect to wages, working condition, and grievance processing, a group or groups

which are numerically superior within the craft or class for which the representative speaks. In the usual case, skilled employees are in the minority. The carrier finds itself in the position, by reason of bargaining exigencies, of paying the unskilled majority of its employees proportionately more in terms of their respective worth than the skilled minority, causing discontent and morale problems among the latter group. This results in a high turn-over and reduced efficiency among the disfavored group.

(c) Employees identify with others primarily by job functions. There is little community of interest between, for example, ramp employees and clerical personnel. Public contact personnel consider themselves a group apart. Each group inevitably resents any alleged preference in pay or working conditions received by another group. If the groups are combined in a single craft or class creating an artificial semblance of identity, each group deems itself entitled to no less than what is received by the others. The carrier, as well as the organization representing the craft or class, adopt the so-called leveling policy of paying a premium for work in the lower classifications with the consequence that wages and benefits in the higher classifications are depressed. This occurs because of the effort to avoid wide variance in benefits within the group even though, in terms of contribution by the employees, such variance is justified. The pressures created by an artificial and illogical grouping of diversely occupied employees substantially impairs the efficiency of the entire organization.

(d) Where functionally separate groups are combined in a single craft or class, serious administrative problems arise in attempting to reconcile the varying work problems and conditions applicable by reason of

the functional separation. The carrier is commonly faced with demands by personnel for benefits to counterbalance the purported advantage possessed by other personnel with dissimilar work situations. The tendency, repeated in many variations, is to insist upon equality of benefits within the craft or class despite the impossibility of comparison.

18. The Board has not conducted any hearing or inquiry into the "craft or class" of United employees in which an election has been directed. It has accepted the Brotherhood's amended designation of the "craft or class" without hearing, for the announced reason that it was "agreed upon" by the Brotherhood and IAM, and because a carrier cannot be a party to a representation dispute. Consequently, United has been unable to present evidence to the Board of the variance in the duties of the employees involved and of the technological development in the airline industry. The craft or class of "clerical, office, stores, fleet and passenger service employees" was first established for bargaining purposes in the airline industry in Board case R-1706 in January, 1947. Such craft or class had been in effect on the railroads for many years and the underlying purpose of the Board hearings in R-1706 (held in 1946) was to determine whether a comparable craft or class was suitable for the airlines. The Board stated in R-1706:

> "If airline employees in jobs comparable to those in the craft or class of railroad clerical, office, station, and storehouse employees fulfill these essential considerations of craft or class, then it follows that such an airline craft or class can be determined. On the other hand, if these considerations are not fulfilled, a different determination of craft or class for airline employees would be in order."

The Board then proceeded to examine the duties of the airline employees involved and found that the "similarity

between functions performed by railroad workers in the craft or class of clerical, office, station and storehouse employees are closely similar to those described herein under the heading" of:

"a. Clerical and office employees including office attendants,
b. Stores employees,
c. Fleet service employees,
d. Passenger service employees."

19. This basis for the Board's determination in R-1706 no longer exists. R-1706 was decided shortly after World War II in the early period of airline growth. The airline industry, as distinguished from the railroads, was still in the formative stage and in a period of expansion with strong prospects of further technological change. The assumption at that time was that operational developments in the airline industry as it matured would parallel the railroad industry. The predicted parallel development has not in fact occurred. Moreover, the history of collective bargaining in the airline industry since 1947 has demonstrated that the Board's determination in R-1706 has not been suitable for airlines. On the major air carriers, the organization of employees for bargaining purposes, which almost invariably follows functional lines, has not in fact conformed to the prediction of such organization which formed the basis of the R-1706 findings. Thus, despite the lapse of 16 years since the R-1706 determination, the craft or class there determined as appropriate for airlines is represented as a single unit on only 12 of the 28 air carriers. In particular, developments at United in the 16 years since R-1706 established that a comprehensive craft or class appropriate to the railroads is simply not feasible at United. Unlike the railroads, United has experienced tremendous expansion since the end of World

War II necessitating administration of employees by job function. Secondly, United employees in this comprehensive grouping have in fact divided along functional lines. Since 1948 all ramp and stores employees have been organized and represented by the IAM. The clerical and public contact personnel, on the other hand, have never organized for collective bargaining purposes at United.

20. The Board often conducts hearings in its investigation of representation disputes, especially when craft or class issues have been raised. The Board usually solicits the views of the carrier and asks the carrier to submit the data which the Board deems pertinent under the criteria it has established to govern craft or class findings. The Board has stated (R-1706):

> "In these cases, as in all others, where disputes arise over the question of craft or class the Board gives considerations to all relevant elements most important of which is the intent of the Railway Labor Act in settling disputes and promoting stable labor relations. Individual cases require consideration of facts peculiar to particular situations, but, in addition, there are general factors to be considered. These include the composition and relative permanency of employee groupings along craft or class lines on carriers generally as well as on particular carriers. The extent and effectiveness of past collective bargaining arrangements, the functions, duties and responsibilities of the employees, the general nature of their work and the community of interest existing between jobs are other factors considered. Previous decisions of the Board which bear upon the issues of the particular dispute are also taken into account."

The Board has not consistently adhered to its R-1706 findings but has departed from them when facts were developed which established inappropriateness of the craft or class at a particular carrier. Thus in the same year R-1706 was decided the Board denied a petition for reconsidera-

tion thereon, stating, however, that its denial did not prevent a re-examination of craft or class as applied to these categories of employees in any future airline representation disputes. See Exhibit K, p. 2. This statement was made by the Board "in recognition of the fact that the airline industry was still in a state of development" and for the further reason that "the clerical and related employees on many of the major air carriers were then unrepresented." This attitude on the part of the Board resulted in later decisions in which the Board departed from its R-1706 finding and authorized elections among employees who constituted but a part of the R-1706 craft or class. Thus as early as 1949, United advised the Board that changes and developments in operational organization at United after R-1706 were such that the R-1706 determination was impractical both from United's and the employees' point of view, and in 1953 (R-2357) the Board stated that because of the "expansion and growth in the airline industry, as well as the development of the representation of airline employees," it was of the opinion that upon proper application, it would be advisable to re-examine the determination in R-1706, with a view to making such modifications as might be found to be justified at the time in question. In February, 1954 (R-2783) the Board did in fact re-examine the findings in R-1706 and concluded, after hearing that *stores* employees at Northwest Airlines constituted a separate craft or class. The Board reaffirmed the separateness of the stores employees in 1956 (C-2252 and C-2389) stating that the representation of the entire "clerical" unit as authorized in R-1706 showed that this "craft or class" was represented as a single unit on only six carriers, only three of which were trunk carriers. Despite these previous pronouncements, and without hearing the evidence, the Board has now reverted to the obsolete findings of R-1706 in insisting that stores employees

shall be combined with clerical, office, fleet and passenger service employees.

21. The refusal of the Board to conduct a hearing on the appropriateness of the craft or class vitally affects the business and property of United and deprives it of procedural due process of law.

/s/ CHARLES M. MASON.

Subscribed and Sworn To before me this ..... day of ....., 1963.

.....

Notary Public.

Exhibit A

Grand Lodge

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
Brotherhood of Railway Clerks Building,
Cincinnati 2, Ohio.

Geo. M. Harrison,
Grand President.

National Mediation Board
File 230-449-7

Subject: Organization—
United Air Lines, Inc.

August 27, 1962

Air Mail

Mr. E. C. Thompson, Exec. Secy. (2)
National Mediation Board
Washington 25, D. C.

Dear Sir:

Please be referred to my letter of August 24, 1962, requesting the services of the National Mediation Board, under Section 2, Ninth, of the Railway Labor Act, as amended, for the purpose of securing certification as to who is the representative designated and authorized, in accordance with the requirements of the Act, of the following craft or class of employes of United Air Lines, Inc.:

> Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet

(excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes.

It is our position that all employes of United Air Lines, Inc., who were formerly in the employ of Capital Airlines in the craft or class for which our Organization was certified by the National Mediation Board as the collective bargaining agent, shall be given the right to vote in any secret ballot conducted by the National Mediation Board for the following reasons:

1. In Interpretation No. 93, Case No. 2-6037, the National Mediation Board found:

> "* * *, this Board is of the opinion that the language of Article 1(b) of the agreement of August 3, 1959, reading 'all provisions of this agreement shall be binding upon the successors and assigns of the company' is clear and unambiguous. In other words, the language means just what it says and we so find."

2. The agreement between the Brotherhood of Railway Clerks and Capital Airlines has an effective date of August 3, 1959, and provides in Article 44 that it "shall continue in full force and effect until February 1, 1962, and thereafter unless thirty (30) days written notice is served by either party signatory hereto as provided in the Railway Labor Act, amended." Neither Capital prior to the effectuation of the merger with United, nor United subsequent to the merger, has served a notice upon our Organization in accordance with the provisions of the Railway Labor Act, as amended, as provided for in Article 44 of the agreement between our Organization and Capital Airlines, mentioned above.

3. Article 3, paragraph (a), of the above-mentioned agreement between Capital Airlines, Inc., and the Brotherhood of Railway Clerks establishes the seniority districts of the employes of Capital in the craft or class commonly

known as clerical, office, stores, fleet and passenger service employes. Seniority District No. 1, as provided by Article 3, paragraph (a), of that agreement, is composed of "General Offices and Stores." Employes engaged in the performance of Stores work hold seniority on a systemwide clerical roster, known as Seniority District No. 1 Roster, covering all General Office and Stores Department employes. Thus, the employes engaged in the occupations on that seniority roster for Seniority District No. 1 held seniority which was valid for exercising rights to all positions engaged in the performance of General Office work as well as all clerical positions in the Stores Department not represented by the I. A. M. on United.

4. Article 3, paragraph (a), of the above-mentioned agreement between Capital Airlines, Inc., and the Brotherhood of Railway Clerks establishes the seniority districts of the employes of Capital in the craft or class commonly known as clerical, office, stores, fleet and passenger service employes. Seniority District No. 2, as provided by Article 3, paragraph (a), of that agreement, is composed of "All Field Stations." Employees engaged in the performance of fleet service held seniority on a systemwide clerical roster, known as Seniority District No. 2 Roster, covering Cargo, Operations, Reservations, Ticketing, Sales, etc. Thus, the employes engaged in the occupations on that seniority roster for Seniority District No. 2 held seniority which was valid for exercising rights to all positions engaged in the performance of work of Operations, Ticketing, Reservations, Sales, etc., which are not represented by I. A. M. on United, in addition to the positions engaged in the work of Cargo Handling and Cabin Service which are represented by the I. A. M. on United.

5. The Civil Aeronautics Board, in Docket 11699, issued Order No. E-16605—In the matter of the United-Cap-

ital Merger Case—which provided in Item 2, paragraph (c), as follows:

> "That, except as noted below, United shall be subject to the labor protective provisions set forth in the appendix to this order."

Section 3 of Appendix A—Labor Protective Provisions —to the Civil Aeronautics Board's order, reads as follows:

> "Insofar as the merger affects the seniority rights of the carriers' employes, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employes affected. * * *"

This provision requires the retention of all seniority rights for Capital employes under our agreement with that corporation.

By operation of our agreement with Capital Airlines, which provides in Article 1(b) that "all provisions of this agreement shall be binding upon the successors and assigns of the company," and which the National Mediation Board in its Interpretation No. 93, Case No. A-6037, has found that "the language means just what it says and we so find," and by reason of the provisions of Section 3 of Appendix A—Labor Protective Provisions—In the matter of the *United-Capital Merger* case—Civil Aeronautics Board's Order No. E-16605—which provides that the seniority rights of Capital Airlines' employes shall be dealt with in an equitable manner, the seniority rights of the former Capital employes now in the employ of United, who occupied positions with Capital in Seniority Districts Nos. 1 and 2, mentioned above, and which extended to positions in occupations not now represented by the I.A.M. on United, should entitle them to vote in the determination of the representative for collective bargaining purposes for the employes

occupying positions to which their seniority is valid and not now represented by any other organization.

The former Capital employes occupying positions now represented by the I.A.M. on United are, in effect, in a furloughed status with regard to all positions to which their seniority was valid under our agreement with Capital and not now represented by the I.A.M. Since the former Capital employes in that status have a valid claim to the exercise of their seniority to some positions in the craft or class (as limited) designated in our request for certification by the Board as the collective bargaining representative on United, such employes have a valid right to cast a ballot to determine such representative. It is requested that the Board permit such employes to participate in the vote.

Very truly yours,

GEO. M. HARRISON,
Grand President.

Exhibit B

Copy

NATIONAL MEDIATION BOARD
Washington

August 30, 1962

Mr. Charles M. Mason,
Senior Vice President Personnel,
United Air Lines, Inc.,
P. O. Box 8800,
O'Hare International Airport,
Chicago 66, Illinois.

Mr. A. J. Hayes,
International President,
International Association of Machinists,
New Machinists Building,
1300 Connecticut Avenue, N. W.,
Washington, D. C.

Gentlemen:

We have an application from the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, to investigate a representation dispute under the provisions of Section 2, Ninth, of the Railway Labor Act among the following employes of the United Air Lines, Inc.

> Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employees.

A copy of Mr. Harrison's letter to the Board, dated August 27, 1962, setting forth additional information pertaining to this application is attached for each of you gentlemen.

Mr. Mason is requested to furnish total number of employees covered by this application, along with any statement he may care to make.

Since the IAM is the current representative for stores and fleet service employees, Mr. Hayes is requested to submit any statement he may care to make with respect to this application.

Very truly yours,

/s/ E. C. THOMPSON,
Executive Secretary.

cc: Mr. George M. Harrison.

Exhibit C

UNITED AIR LINES, INC.
1200 Algonquin Road, Elk Grove Township, Illinois

Mailing Address:
P. O. Box 8800,
Chicago 66, Ill.

Executive Offices

September 7, 1962.

Mr. E. C. Thompson,
National Mediation Board,
1230 Sixteenth Street, N. W.,
Washington 25, D. C.

Dear Sir:

We acknowledge receipt of your letter of August 30 in which you advise United Air Lines that the National Mediation Board has received an application from the Brotherhood of Railway and Steamship Clerks to investigate a representation dispute under the provisions of Section 2-Ninth of the Railway Labor Act among the following employees of the United Air Lines, Inc.:

> "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes."

Since the Brotherhood's application excludes certain employees represented as of August 24, 1962 by the International Association of Machinists, the application is in-

consistent with the National Mediation Board's determination of craft or class in Case No. R-1706 et al. The application, therefore, is for a group of employees smaller than the craft or class which the Board has found to exist in the airline industry.

As United has previously advised the Board on a number of occasions, it is our long established policy and practice to treat only with a labor organization certified by the National Mediation Board pursuant to the Railway Labor Act which requires certification of a duly authorized representative for an entire craft or class. The files of the National Mediation Board will show that United Air Lines voluntarily recognized the International Association of Machinists as the collective bargaining representative of ramp and stores employees in 1948. At the time of this voluntary recognition United supplied the Mediation Board the evidence upon which this recognition was based and the reasons why an exception was being made to its established policy. The National Mediation Board replied, reminding United and the International Association of Machinists that this voluntary recognition did not preclude a subsequent determination by the National Mediation Board of the proper craft or class to which the employees would belong.

It is United's position, therefore, that since the Brotherhood's application requests investigation of a representation dispute involving only a part of a group of employees which the Board has found to constitute a craft or class, it should be dismissed. In the event the Board does not see fit to dismiss the Brotherhood's application, the Board should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board in these previous cases. Only in this manner can the processing of this application result in the certi-

fication to United Air Lines of a duly authorized representative of its employees with which United will be legally obligated to bargain. In making this reply, United does not at this time take any position as to the extent of the proper craft or class of its employees who may be involved in the Brotherhood's application.

In view of United's position as stated above, we will not at this time furnish the total number of employees or our position on the Brotherhood of Railway and Steamship Clerk's contention with respect to the eligibility to vote of employees formerly represented by it on Capital Airlines who are now represented by the International Association of Machinists on United Air Lines.

Since the Board's decision if it does not dismiss the Brotherhood application will vitally affect the existing representation of certain employees by the International Association of Machinists, we are sending a copy of this letter to Mr. Hayes for his information.

Sincerely,

CHARLES M. MASON,
Senior Vice President,
Personnel.

cc: Mr. George M. Harrison,
Mr. A. J. Hayes.

Exhibit D

UNITED AIR LINES

November 2, 1962

Mr. E. C. Thompson,
Executive Secretary,
National Mediation Board,
1230 Sixteenth Street, N. W.,
Washington 25, D. C.

Dear Mr. Thompson:

We acknowledge receipt of a copy of your letter of October 8, 1962 to Mr. George M. Harrison attached to which were two letters from Mr. Harrison to you, dated August 29 and October 5, 1962, respectively.

Mr. Harrison's letter to you, dated October 5, 1962, amends the application of the Brotherhood of Railway and Steamship Clerks to investigate a representation dispute under the provisions of Section 2, Ninth, of the Railway Labor Act so that the craft or class for which the services of the Board are requested is now described as follows:

"Commonly known as clerical, office, stores, fleet and passenger service employes."

In your letter dated October 8, 1962 to Mr. Harrison, you request United Air Lines to furnish the Board with the number of employees in the craft or class described above. The records of United Air Lines indicate that there is a total of 12,451 employees as of October 15, 1962 in such craft as we understand it. Of these 12,451 employees, 3,068 employees are presently represented by the International Association of Machinists and are covered under the terms and provisions of the Ramp and Stores Agreement be-

tween United Air Lines, Inc. and the International Association of Machinists.

We wish to advise the Board that the above figure of 12,451 does not include any employees performing janitorial or cleaning work.

Since the 1949 Mechanics' Agreement between United Air Lines, Inc. and the International Association of Machinists, all janitorial and cleaning work has been recognized as coming within the jurisdiction of the International Association of Machinists and as covered by the Mechanics' Agreement. All janitorial work has been included since the 1949 Mechanics' Agreement in the work of the classification of Utility Employees, which employees had previously been included by the Board in the craft or class of Mechanics on United Air Lines. (Although one of the specific job titles assigned to employees in the Utility Employee classification is Janitor, any employee in the Utility Employee classification may perform janitorial work.) The classification of Cleaning Woman has also been included in each Mechanics' Agreement since the 1949 Mechanics' Agreement.

There are 339 employees classified as Lead Janitors, Janitors or Cleaning Woman as of October 15, 1962.

Very truly yours,

CHARLES M. MASON,
Senior Vice President,
Personnel.

cc: Mr. A. J. Hayes,
Mr. George M. Harrison.

Exhibit E

INTERNATIONAL ASSOCIATION OF MACHINISTS
1300 Connecticut Avenue
Washington 6, D. C.

Office of the
International President.

49-United,

September 11, 1962.

Subj: United Air Lines, Inc.
Application Representation
Dispute filed by BRC.

Mr. E. C. Thompson,
Executive Secretary,
National Mediation Board,
Washington 25, D. C.

Dear Mr. Thompson:

This will acknowledge the receipt of your letter dated August 30, 1962 wherein you advise of the application filed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, to investigate a representation dispute involving certain employees of United Air Lines, Inc. You also enclosed a copy of Grand President George M. Harrison's letter dated August 27th setting forth the position of the BRC with respect to this application.

In reviewing this entire matter, including the information contained in Mr. Harrison's letter of August 27th, it is our considered opinion that the craft or class of em-

ployees as requested by the BRC does not conform to the findings of your Board, particularly with reference to the craft or class determination as set forth in Case R-1706, et al.

Respectfully yours,

/s/ A. J. HAYES,
A. J. Hayes,
International President.

H/FH/ac
cc: Reeves.

Exhibit F

Copy

Grand Lodge

Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes,
Brotherhood of Railway Clerks Building,
Cincinnati 2, Ohio.

Geo. M. Harrison,
Grand President.

File 230-449-7.

Subject: Organization—
United Air Lines, Inc.

August 29, 1962.

Mr. E. C. Thompson, Exec. Secy. (2),
National Mediation Board,
Washington 25, D. C.

Dear Sir:

I wish to acknowledge receipt of your letter of August 27 in response to ours of August 24, 1962, attaching an application for the services of your Board in a representation dispute on United Air Lines, Inc., covering employes "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes."

You observed that from the craft description, stores employes represented as of August 24, 1962, by the Interna-

tional Association of Machinists and fleet service employes represented by the same Association as of the same date are excluded from the application. You asked to be advised as to the significance of the date mentioned and whether it is the position of our Organization that employes hired in the excluded categories after August 24, 1962, would be covered by the application.

The meaning of our exclusion was simply that we did not intend to include in our application the incumbent of any occupation or position represented by the International Association of Machinists on August 24, 1962, but we did intend to include the incumbents of all occupations in those categories if they were represented by the International Association of Machinists by reason of an agreement with the United Air Lines, Inc., entered into at a date subsequent to August 24, 1962. Any employe hired by United Air Lines subsequent to August 24, 1962 in the excluded categories, namely, those positions for which the International Association of Machinists was the collective bargaining agent as of August 24, 1962, is to be excluded from the representation dispute.

In other words, and to state it simply, we wish to make it clear that our request for the services of the Board is not intended to include the incumbent of any position for which the International Association of Machinists was the collective bargaining agent on August 24, 1962, or the persons occupying those positions subsequent thereto.

I hope I have made it clear that we are not contending in our application to the Board for the representation rights of the occupant of any position for which the International Association of Machinists had representation rights on August 24, 1962.

Very truly yours,

/s/ GEORGE M. HARRISON,

Grand President.

Exhibit G

Copy

Grand Lodge

Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes,
Brotherhood of Railway Clerks Building,
Cincinnati 2, Ohio.

Geo. M. Harrison
Grand President.

File 230-449-7.

Subject: Organization—
United Air Lines, Inc.

October 5, 1962.

Mr. E. C. Thompson, Exec. Secy. (2),
National Mediation Board,
Washington 25, D. C.

Dear Sir:

This will acknowledge receipt of your letter of September 13 with regard to our application dated August 24, 1962, for investigation of a representation dispute among certain employees of United Air Lines, Inc. you attached to your letter. a copy of one addressed to the Board, dated September 11, 1962 by Mr. A. J. Hayes, International President, International Association of Machinists, commenting upon our request. You were correct in your statement that Mr. Charles M. Mason, Senior Vice President, Personnel, United Air Lines, had furnished me a copy of his letter of September 7, 1962, addressed to the Board, commenting upon our request for the Board's services. It should be

noted that a copy of Mr. Mason's letter was also furnished to Mr. Hayes.

Under the Railway Labor Act, an employer is not entitled to participate in a representation dispute, and therefore, the Board may not take cognizance of Mr. Mason's comment concerning the appropriateness of the craft or class as defined in my request for the Board's services dated August 24, 1962.

It is noted that Mr. Hayes is collaborating with the management of United Air Lines by also raising the question as to the appropriateness of the craft or class as defined in my letter to the Board dated August 24, 1962. In the last paragraph of Mr. Hayes' letter, he says: "it is our considered opinion that the craft or class of employees as requested by the BRC does not conform to the findings of your Board, particularly with reference to the craft or class determination as set forth in Case R-1706, et al."

Mr. Hayes indicates that the Board furnished him copies of my letters of August 24, 1962, and August 27, 1962, addressed to the Board. It is presumed that since the Board furnished him copies of these two letters, that it also furnished Mr. Hayes a copy of my letter of August 29, 1962. In each of those three letters I made it clear that it was not the intent of our Organization to include in the craft or class description for which we had requested the Board's services in the investigation of the representation dispute any employee of United Air Lines, Inc., subject to an agreement in existence prior to August 24, 1962, the date on which I requested the services of the Board.

The only inference to be drawn from Mr. Hayes' statement, as quoted above from his letter to the Board dated September 11, is that he is of the opinion that our request for the Board's services in this dispute should have included as well the employees in occupations covered by the agreements between the International Association of Ma-

chinists and United Air Lines. I am, therefore, hereby advising the Board of my desire to amend the statement of the craft or class as set out in my request for the Board's services under date of August 24. Please substitute for the description of the craft or class for which the services of the Board are requested, the following:

> Commonly known as clerical, office, stores, fleet and passenger service employees.

The National Mediation Board is urged to process our request of August 24, 1962. as amended herein without further delay.

Very truly yours,

/s/ GEO. M. HARRISON,
Grand President.

Exhibit H

NATIONAL MEDIATION BOARD
Washington

October 8, 1962

Mr. George M. Harrison, Grand President,
Brotherhood of Railway and Steamship Clerks,
1015 Vine Street,
Cincinnati, Ohio.

Dear Mr. Harrison:

Receipt is acknowledged of your letter of October 5, 1962 on the subject of "Organization—United Air Lines File 230-449-7."

We are sending herewith to Mr. C. M. Mason, Senior Vice President of United Air Lines, Inc. and to Mr. A. J. Hayes, President of the International Association of Machinists copy of your letter of October 5, 1962 for their full infor-

mation. Mr. Mason is requested to furnish the Board with the number of employees in the craft or class described in your letter. Mr. Hayes is requested to furnish any comments he may care to make on the subject. We did not furnish either the carrier or the I. A. M. with copy of your August 24, 1962 letter since it contained the number of authorization cards submitted with your application.

We are also sending to Messrs. Mason and Hayes copy of your letter of August 29, 1962 which has not heretofore been sent them.

Upon receipt of the information requested from the carrier we will advise you further on the subject.

Very truly yours,

/s/E. C. THOMPSON,
E. C. Thompson,
Executive Secretary.

4-etm.

cc-to: C. M. Mason,
A. J. Hayes.

Exhibit I

Copy

International Association of Machinists,
1300 Connecticut Avenue,
Washington 6, D. C.

Office of the
International President.

49-United,

October 23, 1962.

Subj: United Air Lines, Inc.
Application Representation
Dispute filed by BRC.

Mr. E. C. Thompson,
Executive Secretary,
National Mediation Board,
Washington 25, D. C.

Dear Mr. Thompson:

This will acknowledge receipt of your letter of October 8, 1962 accompanied by copies of letters addressed to your Board dated August 29 and October 5, 1962 and signed by Mr. George M. Harrison, Grand President of the Brotherhood of Railway & Steamship Clerks, both of which deal specifically with the representation application filed with your Board by the BRC, involving certain groups of employees on United Air Lines, Inc.

At the outset, we categorically deny the allegation made by Mr. Harrison in the third paragraph of his letter of October 5, 1962, wherein he alleges that our Organization is collaborating with the management of United Air Lines. The statement within itself is not worthy of further comment.

The position of our Organization with respect to this representation application, as set forth in our letter of September 11, 1962, is valid and consistent with the past practices of your Board. In our opinion the application filed by the BRC at that time was designed to divide or split a craft or class. This within itself is a position that the BRC has vigorously opposed, notwithstanding the facts pertaining thereto in several instances over a long period of years.

The statement contained in the fifth paragraph of Mr. Harrison's letter dated October 5th, wherein he attempts to express the opinion of our Organization with respect to their application is, again, an opinion of Mr. Harrison and does not direct itself to any opinion expressed by this Organization. We are particularly concerned over the fact that Mr. Harrison now apparently is requesting your Board to amend their original petition to include all employees of United Air Lines "Commonly known as clerical, office, stores, fleet and passenger service employees." If this be the case, we then must call Mr. Harrison's attention to the fact that our Organization has no other choice than to consider this action on the part of the BRC as a raid against the IAM.

All employees of United Air Lines in the categories of stores and fleet service employees, including those who were formerly Capital Airlines employees, are now represented by the IAM and are covered by an agreement with United Air Lines, Inc.

If Mr. Harrison pursues the course as outlined hereinabove, then our Organization will have no choice other than to proceed with formal action in accordance with the procedure of the AFL-CIO Constitution.

Respectfully yours,

/s/ A. J. HAYES,

A. J. Hayes,

International President.

cc: G. M. Harrison,
J. L. Reeves.

Exhibit J

GRAND LODGE

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
Freight Handlers, Express and Station Employes
Brotherhood of Railway Clerks Building
Cincinnati 2, Ohio

Geo. M. Harrison
Grand President

File 230-449-2

Subject: Organization—
United Air Lines, Inc.

October 26, 1962

Mr. E. C. Thompson, Exec. Secy. (2)
National Mediation Board
Washington 25, D. C.

Dear Sir:

Please be referred to the letter of October 23, 1962, addressed to the National Mediation Board by Mr. A. J. Hayes, International President of the International Association of Machinists, a copy of which he furnished to me.

Mr. Hayes' letter concerned the application filed by our Organization under date of August 24, 1962, requesting that the Board investigate a representation dispute among certain employes of United Air Lines, Inc. In that application, as well as my letter of August 27 and my subsequent letter of August 29, both of which were addressed to the Board, I made it clear that it was not the intent of our Organization to include in the representation dispute any

employe of United Air Lines, Inc., who was presently subject to an agreement between the International Association of Machinists and that Company.

Mr. Hayes, by the position he has taken, has left us no alternative but to include in the representation dispute all employes of United Air Lines in the entire craft or class. If in the light of these developments Mr. Hayes chooses to proceed against our Organization under the Constitution of the AFL-CIO, that is his privilege and, under the circumstances, most certainly is of no concern to the National Mediation Board.

Under date of October 8, 1962, you acknowledged receipt of my letter of October 5 amending my request for the services of the Board in this representation dispute to include the entire craft or class. You furnished a copy of your letter of October 8 to Mr. Charles M. Mason, Senior Vice President, Personnel, United Air Lines, Inc., requesting that he furnish the Board with the number of employes in the craft or class. I am now in receipt of a copy of your letter of October 24 addressed jointly to Mr. Mason and Mr. Hayes, tracing Mr. Mason for the information requested in your letter of October 8, 1962.

May I again request the Board to take action without further delay to resolve the dispute with regard to the representation of the employees of United Air Lines in accordance with my application of August 24, 1962, as amended by my letter of October 5, 1962.

Very truly yours,

/s/ GEO. M. HARRISON,
Grand President.

Exhibit K

UNITED AIR LINES
1200 Algonquin Road,
Elk Grove Township, Illinois
Mailing Address: P. O. Box 8800, Chicago 66, Illinois

Telephone 625-1400

January 11, 1963

Executive Offices
Mr. E. C. Thompson,
Executive Secretary,
National Mediation Board,
1230 Sixteenth Street, N. W.,
Washington 25, D. C.

Re: NMB Case No. R-3590

Dear Mr. Thompson:

Mediator Klatte has requested certain information from United for the purpose of holding an election in reference case. We believe his request is premature in the absence of a ruling from the Mediation Board on the request of United made September 7, 1962 that a public hearing be held to establish the proper crafts and classes on United. We hereby renew our request that such a public hearing be held and set forth herein at some length the reasons necessitating a hearing.

We wish to point out to the Board that the group of employees covered in the representation application filed in the above case does not coincide, either in its original or amended form, with any currently applicable craft or class determination. Further, there are distinguishing features between the members of the heterogeneous group of employees involved in this application which the Board has not had the opportunity to fully consider in any prior pro-

ceedings. At a public hearing, the Board will learn of the wide variances in the training, skills and responsibilities of the employees, of the absence of cross-training and cross-utilization between them, and of the absence of a community of interest, for example, between the highly skilled office employees and the janitorial and cleaning employees. The lack of unanimity in the air transport industry in general and on United in particular with reference to the organization of operations, the selection, training, use, representation and lack of permanency in respect to these factors in this dynamic and rapidly changing industry can and should be considered by the Board.

In 1946, in R-1706, the Mediation Board was asked to establish for the first time on an airline a craft or class grouping of employees ranging from what the Board referred to as janitors and laborers to the highest type of technical office employees. The Board attempted in that case to establish a mold to apply to all airlines in the future. Since most of the employees in this heterogeneous grouping were unorganized at the time in the air transport industry, the Board was forced to treat with the important subject of craft or class in somewhat of a vacuum with the "hope" that its prospective determination would provide a basis for stable labor relations in the *future* on *airlines* only because such a craft had been found to provide such a basis in the *past* on *railroads*. Although the Board did avoid a multiplicity of crafts or classes by its determination in R-1706, the Board simply did not have knowledge at the time of its decision (January 31, 1947) of the changes that would and did later occur in the air transport industry.

The BRC contended during the public hearing in R-1706 that because the Railway Labor Act was amended to cover airlines, the same craft or class treatment on rail lines should be followed by the Board on airlines. Although this

specific contention was not accepted by the Board, the Board nevertheless found a craft or class of airline employees that was the counterpart of the railroad craft or class of clerical, office, station and storehouse employees. The IAM, on the other hand, requested a separate craft or class of ramp service and stores employees. This view was rejected by the Board as was the IAM's later request for a reconsideration of the Board's findings.

Although the IAM's request for a reconsideration of the R-1706 findings was denied by the Board in 1947, the Board then stated that its denial did *not* prevent a re-examination of craft or class as applied to these categories of employees in *any* future airline representation disputes. This position was taken in 1947, as the Board later explained in R-2783, in "recognition of the fact that the airline industry was still in a state of development," and further, "that the clerical and related employees on many of the major air carriers were then unrepresented." Thus, the Board recognizes that the lack of representation of the bulk of these employees on many of the major air carriers is a significant factor to be taken into account in representation questions.

At the invitation of the Board, United was present at the public hearing in R-1706 and United's views on craft or class were received by the Board. Based upon its limited experience and in the interests of avoiding an unknown and possibly undesirable multiplicity of crafts or classes, United had recommended adoption of a craft or class substantially the same as the one adopted by the Board.

As early as September 20, 1949, however, United Air Lines advised the National Mediation Board that developments in organization after R-1706 had led United to believe it may have been in error in the position it took before the Mediation Board. United advised the Board that the organizational development by 1949 among the employees

on United after R-1706 and changes in United's own operational organization were such that the Board's determination in R-1706 had become impractical both from the employees' point of view and the carrier's.

In 1951, in a matter concerning the proper craft or class grouping of equipment service men, stock clerks or janitors of Northwest Airlines in R-2357, the National Mediation Board accepted the Statement of United Air Lines. In its Statement, United advised the Board that United had definitely concluded, in light of its experience, that the Board's determination in R-1706 did not provide for a proper craft or class for the air transport industry.

In R-2357, decided February 22, 1953, the Board stated that arguments advanced for reconsideration of the proper groupings of the various occupational classifications of employees which may comprise the craft or class of clerical, office, stores, fleet and passenger service employees impressed the Board as having considerable merit. The Board announced in R-2357 that in view of the lapse of five years after R-1706 and because of the "expansion and growth of the airline industry" as well as the "development of representation of airline employees," *the Board was then of the opinion that upon proper application, it would be advisable to re-examine the determination in R-1706, with a view of making such modifications as might be found to be justified at the time in question.*

In R-2783, decided February 16, 1954, in a case concerning a request by the IAM to represent stores employees of Northwest Airlines separately from the broad clerical group included in R-1706, the Board did examine its R-1706 findings. While it did not re-examine the entire craft or class, the Board concluded that stores employees are a separate craft or class for the purposes of the Railway Labor Act.

In C-2252 and C-2389, decided November 9, 1956, in com-

panion cases relating to the request of the IAM to separate stores employees of Trans-Texas Airways and North Central Airlines from the existing clerical groupings, the Board again re-examined R-1706 findings with reference to stores employees. In so doing, the Board noted that by that time (1956) the representation of the entire clerical craft as outlined in R-1706 showed that such craft was *not* represented as a single unit on any air carriers except six.

The Board went on to say that its records showed that stock and stores employees were organized and covered by collective bargaining agreements on 24 air carriers, independently of the craft as designated in R-1706. United was included by the Board as one of the Board's 24 examples where stock and stores employees were represented as a separate unit by the same organization representing airline mechanics on those carriers. On the basis of evidence presented at the *hearing* and the development of representation among stock and stores employees, the Board concluded that the general purpose of the Railway Labor Act would be more readily achieved and the general duties as specified in Section 2 of the Act would be more readily accomplished by a determination that stock and stores employees are considered separate crafts or classes of employees. The Board's conclusion was reached only after a public hearing.

Inasmuch as United knows of no findings of the Mediation Board subsequent to Cases C-2252 and C-2389 re-establishing the stores employees as a part of the clerical and related group covered by R-1706, it can only be considered now that the R-1706 findings are no longer controlling. It should be noted that the amended application of the BRC in the current case is based on the now obsolete R-1706 findings.

The importance that the Board's craft or class determinations have in settling of disputes and the promotion of

stable labor relations has been clearly recognized by the National Mediation Board. As a necessary corollary, the Board's determination may well disrupt instead of promote stable labor relations and encourage rather than settle disputes among employees. The Board's class or craft determinations have, of course, a demonstrable impact upon the organizational structure and operating efficiency of an air carrier.

The Board itself has recognized that it therefore should review and even revise its class or craft determinations with respect to airline employees after a public hearing, and has done so. In R-1447, for example, the Board altered the craft or class of airline mechanics. In R-2357, the Board concluded that R-1706 should be re-examined and in R-2783, C-2252 and C-2389, it concluded that stores employees are no longer properly grouped with the various other components in what had been a craft or class of clerical, office, stores, fleet and passenger service employees as determined in R-1706. Also, and as recently as 1961, the Board, in C-2946, made a drastic change in the grouping of flight deck crew members of United Air Lines.

As a result of the findings of the National Mediation Board Committee in C-2946, decided January 17, 1961, in the matter of representation of employees of the *United Air Lines, Incorporated—Flight Deck Crew Members,* the Board conducted an election on the basis of a single craft or class in face of a long history of collective bargaining of two separate crafts or classes which had existed not only on United but on a majority of the major air carriers. C-2946 is significant in several respects. In the first place, the Committee found, among other things, that—

> "The airline industry, as distinguished from the railroads, is still in the formative stage and in a period of expansion, with strong prospects of further technological change. The difference between the railroads and

the airline industries affects the application of craft or class principles and criteria with the result that the determination made herein may not be considered, as such, applicable to the railroads."

Further, as pointed out in C-2946, "When governmental participation in the determination of craft and class issues occurred in the railway and air transportation industries, the two branches were in entirely different stages of maturity" and that there is no "high degree of crystallization in craft and class lines" in the "comparatively new air carrier industry" that the years have brought on the railroads. The teaching of C-2946 is that the Board is not necessarily bound by past craft or class groupings; on the contrary, the Board will take a fresh look at crafts or classes in the air transport industry.

Congress has imposed upon United Air Lines, as a scheduled air carrier, the obligation to follow the declaration of national policy to provide " economical and efficient service by air carriers at reasonable charges." United Airlines is also under the statutory command of the Railway Labor Act to treat "in a proper case" with the representative of its employees as certified by the Board for a craft or class determined by the Board. Because of the impact that the grouping of employees into crafts or classes can have upon an air carrier's organization and operation, it is necessary that the Board establish a craft or class or revise one only after the fullest hearing and after obtaining the views of all concerned—including the carrier. The carrier is obviously in the best position to furnish evidence to the Board on the effect that craft or class groupings may have on interruptions of its service to the public. For example, the Committee appointed by the Board in C-2946 requested information from United before making the important craft or class determination which had such a dramatic effect upon the

entire air transport industry that the President of the United States and the Secretary of Labor intervened.

The inappropriateness of the Board's R-1706 findings of 1947 have been apparent for some time not only to United but to others, as pointed out above. The Board itself, as noted, recognized that the R-1706 findings are no longer appropriate. The fact that 16 years have elapsed since the R-1706 findings and there still is no representation of the clerical and related employees on many of the major air carriers renders R-1706 even more obsolete. United has enlarged to where it is the largest domestic scheduled air carrier. Thus, any craft or class determination made in 1947 for another airline on the prospect of future employee representation, which has never occurred, cannot properly be applied 16 years later to the organizational and operational structure of United. A determination of what craft or class groupings are now appropriate should only be made after a public hearing.

In summary, United Air Lines believes a public hearing is not only appropriate, but necessary to serve the public interest for the following reasons:

> The Board's determination in R-1706—issued sixteen years ago—was not based upon actual airline experience and history, but was carried over from the railroads. Whether it would become suitable for the airlines had to be left for future developments.
>
> Experience in the airline industry since 1947 has demonstrated that the Board's determination in R-1706 has not been suitable for the airlines, as witnessed by the fact that the Board itself has reexamined and departed from its R-1706 determination in various subsequent cases (R-2783, C-2389, C-2487), and the organization of employees on major air carriers has not conformed to the R-1706 findings.
>
> United's own experience over the sixteen-year period which has elapsed since R-1706, during which time there has been a substantial growth and evolution in the

Company, clearly establish the inappropriateness of R-1706 to present day conditions.

The carrier's ability to operate efficiently and to have stability in labor relations would be severely hampered by imposition of the now obsolete determination on United since R-1706 lumps together heterogeneous groups of skilled and unskilled employees in a manner wholly inappropriate to the Company's present organizational structure.

The Board, as noted above, has committed itself to take a fresh look in a public hearing at the appropriateness of a craft or class when appropriateness is questioned in light of changed conditions.

Based upon United's study and experience, as well as observations in the industry, United believes that the groups of employees under discussion probably logically separate into three large crafts or classes. At the Board's hearing, United will be prepared to supply the Board with full historical and present facts upon which the Board can judge the propriety of what is proper under all the facts.

Sincerely yours,

/s/ C. M. Mason,
Senior Vice President-Personnel.

cc: Mr. George Harrison
Mr. A. J. Hayes
Mediator Klatte

Exhibit L

NATIONAL MEDIATION BOARD
Washington

January 17, 1963

NMB Case No. R-3590

Mr. Charles M. Mason, Sr. Vice President
United Air Lines, Incorporated
P. O. Box 8800
Chicago 66, Illinois

Dear Mr. Mason:

Acknowledgement is made of your letter of January 11, 1963 in re NMB Case No. R-3590. You state you believe the request made by Mediator Klatte for certain information from United Air Lines, for the purpose of holding an election in this case, is premature in the absence of a ruling from the National Mediation Board on the request of United Air Lines dated September 7, 1962 that a public hearing be held to establish the proper crafts or classes on United Air Lines.

Reference to your letter of September 7, 1962 shows the specific request you made was as follows:

> "It is United's position, therefore, that since the Brotherhood's application requests investigation of a representation dispute involving only a part of a group of employees which the Board has found to constitute a craft or class, it should be dismissed. In the event the Board does not see fit to dismiss the Brotherhood's application, the Board should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board in these previous cases."

The application filed by the Brotherhood of Railway & Steamship Clerks on August 24, 1962 was not dismissed, and was subsequently amended to cover the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service Employes. You were so advised by copy of Mr. Harrison's letter of October 5, 1962 transmitted with copy of our letter to Mr. Harrison dated October 8, 1962.

In our letter of October 24, 1962, addressed to you and President Hayes of the International Association of Machinists, we inquired whether you were in a position to furnish the number of employes in this craft or class as requested in the last paragraph of our letter of October 8, 1962. On November 2, 1962 you replied and stated "the records of United Air Lines indicate there is a total of 12,451 employes as of October 15, 1962 in such craft as we understand it." You further stated this figure did not include 339 employes classified as Lead Janitors, Janitors or Cleaning Women as of October 15, 1962. Your letter of November 2, 1962 indicated a clear understanding of what is meant by the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service Employees as referred to in the Board's determination issued in NMB Case No. R-1706, et al.

The various comments made in the remainder of your letter of January 11, 1963 have been given careful consideration by the Board. The Board wishes to call your attention, first, to the fact that the carrier is not a party to this representation dispute. Secondly, no request for a review of the craft or class established by the Board's determination in Case No. R-1706, et al has been received from either organization party to NMB Case No. R-3590. The request contained in your letter of January 11, 1963 is not timely made, since the Board, on December 19, 1962, found that a representation dispute existed among the employees in this craft or class and has authorized an election.

For the above reasons, the Board must deny your request of January 11, 1963 for a public hearing on the subject of a review of the determination made in Case No. R-1706, et al.

It is, therefore, requested that you furnish promptly to Mediator Klatte the necessary information regarding the employees of United Air Lines, Inc. in the craft or class at issue, so he may proceed with plans to hold an election among these employees. Your cooperation in furnishing this information promptly to Mediator Klatte will be appreciated.

By direction of the National Mediation Board.

/s/ E. C. THOMPSON,
Executive Secretary.

cc to: G. M. Harrison
A. J. Hayes
W. F. J. Klatte

Exhibit M

UNITED AIR LINES

1200 Algonquin Road, Elk Grove Township, Illinois
Mailing Address: P. O. Box 8800, Chicago 66, Illinois
Telephone 625-1400
Executive Offices.

January 25, 1963.

Mr. Leverett Edwards,
Chairman
National Mediation Board
Washington 25, D. C.

Dear Mr. Edwards:

Acknowledgment is made of the Board's reply dated January 17, 1963 to United's letter of January 11, 1963. The Board in its reply denies United's request that the

Board hold a public hearing to establish the proper crafts and classes on United.

The purpose of this letter is to protest the Board's refusal and to ask that the Board reconsider United's request. In support of our request for reconsideration, I wish to supplement my letter of January 11, 1963.

We in United are astonished that the Board would make a decision vitally affecting 12,700 employees and which will have a long lasting and adverse effect upon the operating efficiency and economy of United without obtaining the views of everyone concerned. The Board's denial of United's request indicates that the Board is somehow prohibited from obtaining or considering United's views on the craft or class question on the ground that United is not a party to this representation dispute. This is indeed strange since on a number of previous occasions the Board has specifically invited United to express its views at public hearings on the question of what constitutes a proper craft or class. Indeed, both of the contesting labor organizations have at one time or another in the past complimented United for its expression of such views and have urged United to express them at subsequent public hearings.

In stating that the carrier is not a party to this representation dispute the Board's reply attributes to United a position it has never sought and does not now seek. United is fully aware that it is not a party to any controversy over the choice of representatives by the employees; indeed, United has no desire to be such a party and recognizes the legal and proper right of the employees to choose their own representative, if they wish one. United submits, however, that it has a legitimate interest in the scope of a craft or class. In other words, the *only* issue in which United asserts a right to be heard concerns the *scope* of the craft or class—not the identity of the representative, if any, of the employees of such craft or class in an election.

The Board's failure to recognize United's legitimate interest in the scope of a craft or class will interfere with the efficient conduct of United's business. The refusal by an administrative agency of the Federal government to afford United an opportunity to be heard at a public hearing in a matter which will so seriously affect United's ability to conduct its business is in fact a denial of due process.

Further, the Board, on its own initiative and in the exercise of its own discretion, should hold the requested public hearing. Any rule of the Board that a carrier does not have a status which entitles it to be heard on the breadth of a class or craft is as archaic as the railroad craft or class in which an election is proposed. The Board has a responsibility under the Railway Labor Act to work for the establishment of stable labor relations in the airline industry. As the Board well knows, a craft or class determination can have a serious and disruptive effect on interstate transportation. This was clearly shown when President Kennedy, on the day of his inauguration, had to assign the Secretary of Labor to mediate airline strikes resulting from a craft or class determination which was arrived at after lengthy public hearings stretching over many months. It cannot be said that the purposes of the Act are better served when an inappropriate craft or class determination is imposed upon over 12,000 employees without any public hearing whatsoever.

You seem to imply in your letter that United's request for a public hearing is tardy and should have been repeated at the time the Brotherhood of Railway Clerks amended its representation application. United had no way of knowing at the time the Brotherhood amended its application that an election would in fact be held. This was not known until Mediator Klatte had checked authorization cards and on approximately December 19, 1962, advised United that the Board had authorized an election. Prior to that date, we

could see no useful purpose to be served in pressing for a public hearing on the subject of how employees should be grouped for voting purposes in an election that might never be held.

You further point out that United had a clear understanding of what is meant by the clerical, office, stores, fleet and passenger service employees craft or class when, on November 2, 1962, we advised you of the total number of United employees in that craft or class. We do not understand the significance of this statement. The fact that United did advise you of the total number of employees in the group described as the craft or class did not, of course, imply that United considered that the grouping was a proper one. Our request for a public hearing was not for the purpose of being advised by the Board where the boundaries of that craft or class lie. Our request was based upon the firm belief that the Board should review its determination of craft or class in R-1706, et al, and determine, in light of the lapse of 15 years, and the other factors set out in our letter of January 11, whether the R-1706 determination was still a proper grouping.

Finally, the imposition by the Board of an inappropriate railroad craft or class upon 12,700 employees of this dynamic and changing air transportation industry is illogical. The "clerical, office, station, and store house employees craft or class" grew up out of the historical development of the railroad industry. To say that a craft or class springing from the history of the then static and now declining railroad industry should be forcibly imposed on the airline industry, which has an entirely different history and is still growing, is illogical and improper. If the Board restricts air carriers to railroad rigidity, United will not be able to discharge fully the obligation imposed upon it by Congress through the Federal Aviation Act to provide efficient and economical service at reasonable charges to the

public. In fact, my personal observations of the operations and organization of Capital Air Lines before Capital had to be merged into United or face bankruptcy convinced me that part of Capital's difficulties resulted from the Board's action in 1947 in forcing a vast and heterogeneous group of employees into a single craft or class because that craft or class had been satisfactory on railroads in the past and the Board "hoped" it would be in the future on air lines.

For these reasons, we strongly urge the Board to reconsider its denial of United's request for a public hearing.

Sincerely yours,

C. M. MASON,
Senior Vice President—Personnel.

cc: G. M. Harrison
A. J. Hayes
W. F. Klatte

Exhibit N

NATIONAL MEDIATION BOARD
Washington

February 4, 1963

NMB Case No. R-3590

Mr. C. L. Mason, Sr. Vice President,
United Air Lines, Incorporated,
P. O. Box 8800,
Chicago 66, Illinois.

Dear Mr. Mason:

Acknowledgement is made of your letter of January 25, 1963, addressed to Chairman Edwards of this Board, protesting the Board's refusal to hold a public hearing on the question of craft or class in NMB Case No. R-3590, and asking that the Board reconsider United's request.

The Board, in executive session on January 31, 1963, gave very careful consideration to the various statements made in your January 25th letter. As you are aware, the two organizations which are parties to this dispute are in agreement that the craft or class of Clerical, Office, Stores, Fleet and passenger Service employees established by the Board's findings in NMB Case No. R-1706, et al. in the determination issued January 31, 1947, is the proper and appropriate grouping of these employees for the purposes of an election under Case No. R-3590.

The Board has received a number of letters and telegrams purporting to be from employees of United in this craft or class, protesting against a vote embracing the entire craft or class, and in some instances, asking that the Board include a space on the ballot for a vote for "no representation". A statement of the Board's position on these two questions has been prepared, dated January 25, 1963, copies attached. A large number of the communications referred to appear to have been inspired by your circular letter of January 14, 1963 addressed to all United Employees eligible to vote in the election under Case No. R-3590. The total number of such communications, however, represents only a small minority of the approximately 13,000 employees in the overall craft or class which you have reported. The Board is not in position to recognize these requests as justifying a hearing on craft or class in Case No. R-3590.

Your remarks concerning the carrier's interests in a craft or class determination have been given full consideration. Over the years, since the creation of the Board 1934, hundreds of determinations of craft or class have been made governing carrier employees in both the railroad and airline industries. Accommodations to the crafts or classes found appropriate by the Board have been made by the carriers concerned, when necessary, and with practically no protest.

Under all the circumstances existing in this case, the Board can see no justification to open the class or craft question on its own motion. Your request for reconsideration of the Board's decision contained in our letter of January 17, 1963 is accordingly denied.

Mediators Klatte and Pierce, who are assigned to the handling of this case, report that to date the carrier has not furnished them a list of the employees involved in this dispute. The record of this case shows that requests for this list have been made on the following dates:

December 19, 1962 by Mediator Klatte verbally to Mr. Berthoud and Mr. Hill.

January 14, 1963 by Mediator Klatte to Mr. Berthoud.

January 17, 1963 in the Board's letter to you.

January 21, 1963 by Mediator Klatte to Mr. Berthoud.

January 28, 1963 by Mediator Klatte to Mr. Berthoud.

Your attention is directed to the last sentence of Section 2, Ninth of the Railway Labor Act, reading as follows:

"The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

You are hereby requested to furnish the list of employees involved in this dispute, in the form requested by Mediator Klatte on December 19, 1962, and corrected to January 14, 1963 without further delay. Your prompt advice as to when this list may be expected will be appreciated.

By direction of the National Mediation Board.

E. C. THOMPSON,
Executive Secretary.

cc to: G. M. Harrison,
A. J. Hayes,
Wm. F. J. Klatte.

Exhibit O

UNITED AIR LINES

1200 Algonquin Road, Elk Grove Township, Illinois
Mailing Address: P. O. Box 8800, Chicago 66, Illinois

Telephone 625-1400
Executive Offices

January 18, 1963

Mr. Francis J. O'Neill,
Chairman,
National Mediation Board,
Washington 25, D. C.

Dear Mr. O'Neill:

Mediator Klatte has asked whether United Air Lines will allow the National Mediation Board to hold a ballot box election on United Air Lines property at points where fifty (50) or more of United's employees involved in Case R-3590 are located.

United Air Lines is willing to allow a ballot box election on Company property provided the ballot follows the form used by the National Labor Relations Board in similar union representation elections held under the National Labor Relations Act. In other words, the ballot would have a space for the employee to vote *against* representation as well as space for the employee to vote *for* representation by the Brotherhood of Railway Clerks or the International Association of Machinists. The ballot also could provide space to vote for "any other organization or individual" or not provide such a space, as the Board might deem proper in the light of the revision of the ballot. We would also expect that the customary rules would be established and followed to insure that the election is conducted

without any undue influence upon the employees eligible to vote. If the balloting is conducted in this manner, United also would be willing to have the employees vote during their working hours in order to provide the fullest opportunity for them to express their decision.

We want to make it very clear that United Air Lines recognizes that how a representation election is conducted is the function of the National Mediation Board. We feel strongly, however, that the employees eligible to vote in the election should know all of the choices available to them at the time the voting takes place and how to express their own free choice. The form of ballot customarily used by the Board in elections does not do this since it provides spaces only to vote *for* a collective bargaining representative. It does not offer any way for an employee who does not want a collective bargaining representative to express his choice to remain unrepresented.

We are, of course, aware that under the Board's rules the employees can remain unrepresented if less than 51% of the craft or class cast valid ballots in the election. In effect, however, this means that the employee expresses his choice to remain unrepresented only in a negative manner—by not voting or by invalidating his ballot in some way. Further, to the best of our knowledge, neither the Notice of Election nor any other instructions on voting issued by the Board make clear to the employees how they can indicate their desire to remain unrepresented.

We recognize that the form of ballot customarily used by the National Mediation Board was adopted by the Board in 1934, prior to the appointment of any of the Board's present members. We further understand that the Board in the past has justified the form of its ballot on the ground that the Railway Labor Act contemplates that the employees shall have some form of representation. As stated by the National Mediation Board in "Administration of the

Railway Labor Act by the National Mediation Board, 1934-1957", pp. 18-19:

> "The above-quoted excerpts from the act show clearly that it was the intent of Congress in framing the 1934 Amendments to the original Railway Labor Act of 1926, that both the carriers and employees separately designate representatives for the purpose of collective bargaining. To effectuate this mandate of the Congress, the National Mediation Board, in 1934, designed the form of ballot which has been used without material change to the present time. *This ballot was drafted to permit the employees to secure some form of representation, as contemplated in the sections of the law quoted above.* It leaves to the majority of the employees of any craft or class full freedom to determine who shall be their representative for the purposes of the act." (Emphasis supplied.)

United suggests to the Board that the legislative history of the 1934 Amendments to the Railway Labor Act in no way supports the restrictive interpretation placed upon that Act in the above statement. In fact, it lends strong support to a contrary interpretation.

The House Report on H. R. 9861, i.e., the bill which was enacted into law on June 21, 1934 as the 1934 Amendments to the Railway Labor Act, states in pertinent part, as follows:

> "2. It (H. R. 9861) *provides* that employees shall be free to join any labor union of their choice *and likewise be free to refrain from joining any union if that be their desire* and forbids interference by the carrier's officers with the exercise of said rights." (Emphasis supplied.) (House Report No. 1944 to accompany H. R. 9861, U. S. House of Representatives, Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 1934 at p. 2.)

The bill being considered provided that "Employees shall have the right to organize and bargain collectively

through representatives of their own choosing." This is exactly the same language used in Section 2, Fourth, of the Railway Labor Act as finally enacted into law. It is evident, therefore, that the House Committee believed the right of employees to refrain from collective bargaining was implicit in the language of the bill.

It is also significant that the House Committee, unlike the National Mediation Board, saw nothing inherently inconsistent between the right of employees to refrain from collective bargaining and the language of Section 2 of the bill which states that one of the purposes of the Act is "to provide for the complete independence of carriers and of employees in the matter of self-organization . . ."

Further evidence that Congress did not intend to deny employees the right to refrain from engaging in collective bargaining is found in the following statement made by Commissioner Joseph P. Eastman, Federal Co-ordinator of Transportation and draftsman of the bill which was eventually enacted into law, in response to a question raised by Mr. Huddleston in the House Hearings on H. R. 7650:

> "Mr. Huddleston: Well, as I get your idea it is the purpose of this bill not to coerce organization and not necessarily to imply organization.
>
> "Commissioner Eastman: No, it does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." (Hearings, H. R. 7650, U. S. House of Representatives, Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 1934 at p. 57.)

Further corroborating the foregoing evidence of legislative intent is the following statement by Senator Wagner in the Senate Hearings on S. 3266 (the companion bill in the Senate to H. R. 7650) in which he defends the bill

against charges that it would tend to promote large national labor organizations:

> "Senator Wagner: I am very glad you (Commissioner Eastman) are bringing out these points so very clearly. * * * (I) think that is the purpose of the Act—I think it is so expressed in language, to give the worker *a free choice to join* any union he wants, company union or *no union*, and yet they (i.e., the opponents of the bill) have insisted (that) by giving him free choice that it creates a large national union. I do not know how that conclusion is reached, but it has been broadcast, so I am very glad you are clearing that point." (Emphasis supplied.) (Hearings on S. 3266, U. S. Senate, Committee on Interstate Commerce, 73rd Cong., 2d Sess., 1934 at p. 12.)

Finally, there is the following comment by Senator Wagner at the Senate Hearings on S. 3266 in response to a charge made by Mr. M. W. Clement, Vice-President of the Pennsylvania Railroad Company, that the bill would have the effect of compelling employees to join a labor organization:

> "Senator Wagner: * * * I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not join any union or to remain unorganized.
>
> "Mr. Clement: That is the way we hope they will read when they are finally amended."

As you also are aware, the form of the National Mediation Board's ballot was the subject of court review in *McNulty* v. *National Mediation Board*, 18 F. Supp. 494 (N. D. N. Y., 1936). In that case the court decided that the form of the ballot used by the National Mediation Board was improper because it did not afford the employees an opportunity to truly express their will, stating on pp. 501-02 as follows:

> "It is manifest that this ballot did not present the issue to the eligible voters.

"The issue, of course, as the mediator admittedly found, was whether the men desired to continue under the individual contract method or the National Union representation.

"Concerning these two methods, the O. R. T. brief says: 'These two methods of employer-employee relationships are diametrically opposite, both in theory and practice. They have nothing in common. There can be no representation under the first method and representation is essential under the other.'

"But the employees had no opportunity to express a choice between these methods. They were in effect told that they must have representation for collective bargaining and were asked to elect between the National Union (O. R. T.) and an unknown.

"Unless the statute in question is meant to compel a majority of the employees (not an individual employee) to surrender their constitutional rights to contract for their own services, and the defendant O. R. T. does not so contend, then the ballot in question in no real sense determines whether the employees wish to retain the old method of individual bargaining, or prefer to change over to collective bargaining.

"In short, the ballot is an artificial thing in no wise disclosing which method of contracting the majority wish, but merely shows that, if they must have collective bargaining, they preferred the O. R. T. to some unknown person or organization.

"It is idle to say that 'it was not necessary for the contract men to affirmatively vote their desire in order to win but merely necessary that their vote be against representation by the O. R. T.'

"Fifty employees tried to do just that by putting an X mark in the square opposite the words 'if you desire representation by any other organization or individual mark an X in the square,' but because they did not write in the name of some organization or individual as representative in collective bargaining, the votes were declared void and not counted.

"The ballot gave them no opportunity to vote

against representation by the O. R. T., for their choice was limited to representation by O. R. T. or by some unknown representative."

Continuing this line of reasoning, the court stated:

> "Confronted with such a ballot, many may have feared that some militant group might want to write in the name of the president of the railroad or some obnoxious foreman, and, believing that they had to select some one to represent them in collective bargaining, rather than take such chances of an unknown representative, they voted for the known O. R. T.
>
> "How they would have voted had the real issue before them been presented by the ballot, no one knows or can know until another ballot presenting that issue is taken." (p. 502.)

Having concluded that the election was unfair, the court declined to exercise its discretionary power to grant the injunctive relief requested by O. R. T., explaining as follows:

> "Shall the court by mandatory injunction compel these men to have collective bargaining when they may not want it and compel the road to treat with the O. R. T. as representative in collective bargaining in such circumstances as here exist. Clearly not, unless the court has no other alternative. . . ." (pp. 502-503.)

The court found that it was not absolutely bound to enforce the certification issued by the N. M. B. under circumstances such as these where the manner of conducting the election offended the court's conscience.

No appeal was taken from the decision of the trial court, and although the Supreme Court subsequently held in the *Switchmen's* case (320 U. S. 297 (1943)) that a certification by the N. M. B. is not reviewable by a Federal District Court, the *McNulty* case is still persuasive authority in support of the proposition that the form of election ballot

presently used by the N. M. B. does not permit a true expression of employee sentiment.

We sincerely hope that the National Mediation Board will see its way clear to revise its election procedures so that our employees and employees of other carriers in future elections will have an opportunity to express their decision on all of the choices that are available to them, one of which is to remain unrepresented. We will be happy to discuss this matter further at the convenience of the Board.

Very truly yours,

/s/ CHARLES M. MASON,
Senior Vice President,
Personnel.

CMM:bg

cc: G. M. Harrison
A. J. Hayes
W. F. Klatte

Exhibit P

NATIONAL MEDIATION BOARD

(An Agency of the United States Government)

OFFICIAL BALLOT

Teletype Operators (Telegraphic Equipment Operators)
Employed by
United Air Lines, Inc.

Case No. R-3426

July 14, 1960 to August 8, 1960

A dispute exists among the above named craft or class of employees as to who are the representative of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, and the National Mediation Board is taking a Secret Ballot in order to ascertain and to certify the name or names of organizations or individuals designated and authorized as representatives for the purpose of the Act.

If you desire to be represented by:
Air Line Communication Employees Association,
Unaffiliated
Mark an "X" in this square..... ☐

If you desire to be represented by:
Communication Workers of America, AFL-CIO
Mark an "X" in this square..... ☐

If you desire to be represented by:
Any Other Organization or Individual
Write name of such representative on the line below

_____

And mark an "X" in this square..... ☐

This Is A Secret Ballot. Do Not Sign Your Name.
(Marks in more than one square make ballot illegal.)
(Sample.)

Exhibit Q

UNITED AIR LINES
1200 Algonquin Road, Elk Grove Township, Illinois
Mailing Address: P. O. Box 8800, Chicago 66, Illinois
Office of the President

January 22, 1963

Honorable Francis J. O'Neill,
Chairman,
National Mediation Board,
Washington 25, D. C.

Dear Mr. O'Neill:

Mr. Mason, our Senior Vice President—Personnel, has shown me his letter to you concerning the Mediation Board's request to conduct an election on the property of United Air Lines in the craft or class of clerical and related employees. My personal interest in good labor relations and democratic practices cause me to supplement Mr. Mason's letter with some of my own views.

As I understand it, the ballot furnished to the employees by the National Mediation Board plainly states that the purpose of the election is for the employees to designate a union to represent them—not whether they want a union and, if they do, which one. Also the ballot has on it only the name of the one or more unions desiring to represent the employees and a blank space for the employees to vote for some other organization or individual not named on the ballot. This certainly leaves the employee with the inference that he has no choice but to vote *for* some union to represent him. Additionally, the Mediation Board does not tell the employee at any time how to express his choice if he wishes to remain unrepresented by a union.

What especially concerns me about this procedure is that it is carried on by an agency of the United States Government in the conduct of its official duties. In my opinion, this type of election procedure is not at all in keeping with the normal democratic processes of our country. It certainly cannot be the policy of the United States Government to conceal from employees all the choices available to them, one of which is to remain without union representation.

Since 1935, the National Labor Relations Board has conducted thousands of elections, in all of which provision is made on the ballot for employees to vote for one or more unions, or for no union. There appears to be nothing in the Railway Labor Act to prohibit using the same type of ballot that has been used for over 25 years in all National Labor Relations Board elections. In view of this, it is timely that the Government give free expression of choice to employees participating in representation elections under the Railway Labor Act, and establish a uniform procedure for conducting elections by all Boards authorized to conduct such elections.

I am taking the liberty of directing a copy of this letter to the Attorney General of the United States, and to the Secretary of Labor and hope that these gentlemen will take an interest in this matter, in view of the proper concern of the federal government for the rights of individuals. Additionally, they may wish to consider whether such a biased representation election procedure is in accordance with the national labor policy. I sincerely hope that you will undertake to confer with them concerning the policy of the United States Government on this question.

Although United Air Lines has had a great many years of fine and peaceful relations with its organized employees, I and my associates in the Company feel that the type of election conducted in the past by the National Mediation

Board is not in the best interest of good labor relations or in accord with democratic principles which provide individuals with a full and fair opportunity to express their choice in matters which vitally affect them. I, therefore, sincerely hope and urge your Board to review your election procedures within the Government and to take necessary corrective action so that United's employees and other employees who will vote in future elections will be able to freely express their own will with respect to union representation.

Respectfully submitted,

WILLIAM A. PATTERSON,
President.

cc: Honorable Robert F. Kennedy,
Attorney General.
Honorable W. Willard Wirtz,
Secretary of Labor.

Exhibit R

NATIONAL MEDIATION BOARD
Washington

January 24, 1963

NMB Case No. R-3590

Mr. Charles M. Mason, Sr. Vice President,
United Air Lines, Incorporated,
P. O. Box 8800,
Chicago 66, Illinois.

Dear Mr. Mason:

Further reference is made to your letter of January 18, 1963 on the general subject of the form of ballot used by the National Mediation Board in conducting employee representation elections under Section 2, Ninth of the Railway Labor Act.

As you have been previously advised, the Board has consistently held, a carrier is not a party to a representation dispute involving the selection of a representative of its employees. However, the Board welcomes the expression of your views and will give you a summary of its practices and rules in the matter of holding representation elections which have been developed as the best and most practicable procedures to insure that such elections will be fair and free from interference, influence and coercion.

As you state in your letter, the form of ballot presently used was adopted by the Board in 1934 and has been used since that time as the form best designed to ascertain the representation desires of a carrier's employees for the purpose of collective bargaining. The blank line appearing on the present form of ballot affords an opportunity to the

voter to vote for some organization or individual other than those named on the ballot, or he may refrain from voting at all if he so chooses. There is no compulsion that he vote for a contestant for representation. Introduction of a "yes" or "no" ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees for the purposes described in Section 2, First and Second of the Railway Labor Act, which are quoted below for ready reference:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> "Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The Board has reviewed your reference to the case of *McNulty* v. *National Mediation Board*, 18 F. Supp. 494 (N. D. N.Y., 1936), contained on pages 4, 5 and 6 of your letter. Your quotations from the decision of the District Court omits reference to the fact the National Mediation Board was removed as a party to this case during the Court proceedings. The Judge's opinion contained the following statement not quoted in your letter:

> "The National Mediation Board not being a party to this suit, the Court can make no order directly affecting that Board. * * * The conclusion then is that no

party is entitled to affirmative relief. The complaint and the cross complaints are all dismissed without cost to any party against any other party.'''

It will be observed that the decision of the Court in the *McNulty* case in no way ordered discontinuance of the form of ballot customarily used by this Board. Since the Board's certification in that case was not set aside, the comment of the Court on the form of ballot must be regarded as *obiter dictum*. The *McNulty* case has never been considered by the National Mediation Board as controlling the Board's functions or practices under the Railway Labor Act.

In light of the above, this Board sees no reason to deviate from its customary form of ballot in the current dispute, and it will be used by the mediator in conducting the election in NMB Case No. R-3590.

By direction of the National Mediation Board.

/s/ E. C. THOMPSON,
E. C. Thompson,
Executive Secretary.

cc-to: G. M. Harrison,
A. J. Hayes,
Wm. F. J. Klatte.

Exhibit S

February 1, 1963

Mr. Leverett Edwards,
Chairman,
National Mediation Board,
Washington, D. C.

Dear Mr. Edwards:

We have the Board's letter of January 24, NMB Case No. R-3590, in reply to our letter of January 18 on the form of ballot being used by the National Mediation Board. We appreciate the Board's furnishing us with a summary of its practices in holding representation elections.

We understand your letter to say that if the Board used a ballot that allows employees to express a desire to remain unrepresented, this would somehow circumvent a mandate of Congress that employees shall be represented. In short, employees must be represented by a union or other organization or individual. In other words, it has been the view of the Board that the purposes of the Act would be defeated by carriers treating separately with individual employees and that therefore employees are not given freedom to express a choice in a Mediation Board election between being represented or remaining unrepresented. Rather, the Board has limited employee voting to a determination of who shall be designated as the representative of the employees in the appropriate class or craft—and not whether there shall be any representative at all. Please advise us if this does not correctly reflect the Board's policies and practices.

We appreciate that the Board's position stems from the adoption of the present form of ballot in 1934, well before the appointment of the present members of the Board. We

think, however, that the present Board should re-examine its position to see whether it is based upon a proper interpretation of the Railway Labor Act in light of the facts in this case. Stated in another way, irrespective of the type of ballot used by the Board in other elections, the facts of this election justify Mediation Board action to use a ballot which gives employees an opportunity to indicate whether they do or do not want union representation. In the forthcoming election, there are approximately 9,700 employees eligible to vote who are not now and never have been represented by a labor organization. These employees, together with 3,000 of our organized employees, will be eligible to participate in the largest single airline employee representation election ever held by the National Mediation Board since the airlines were placed under the Railway Labor Act.

The Board has said that in instances where the employees are not represented, the representation dispute is between the employees who desire representation on the one hand and the employees who do not desire representation or who are indifferent on the other. As the Board stated in its Twenty-Seventh Annual Report, p. 37:

> "... in a dispute where employees are seeking to designate a representative for the first time the dispute is between those who favor having a representative as opposed to those who are indifferent or are opposed to having a representative for the purpose of the act."

Especially in this case, where such a large number of presently unrepresented employees are involved in the election, it seems entirely appropriate that such employees have an opportunity to indicate a desire to maintain their present status. Contrariwise, it seems entirely improper that the employees who may not want to be represented or who are indifferent—whom the Board recognizes as one of the parties in a representation dispute among unorganized

employees—should be offered an election procedure which fails to provide a way to express a choice to remain unrepresented.

The Board's present form of ballot concerns United because it may thwart the desire of the majority of an unrepresented craft or class to remain unrepresented, if that is their desire. The purpose of the Act to promote stable labor relations will not be effectuated by forcing an unwilling majority of employees in a craft or class to have their rates of pay and working conditions established through a process they do not want. A contrary result may well be reached.

Section 2, Fourth, of the Railway Labor Act is the section of the Act which relates directly and specifically to the employees' right to organize and bargain collectively. It provides that:

> "Employees shall have the *right* to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this Act." (Emphasis supplied.)

The Board's election procedure clearly recognizes the right of a majority of a craft or class to organize and bargain collectively if it chooses to exercise that right. There is, however, a large gap between recognizing the existence of a right and making the exercise of that right a mandatory requirement—which is in effect what the Board's voting procedures do. In fact, compelling employees to organize and bargain collectively effectively abridges the employees' right granted them in Section 2, Fourth. A right is no longer a right when one is compelled to exercise it but is transformed into a duty. Such a transformation obviously is contrary to the language of the Act and the Congressional intent. Section 2, Fourth, properly leaves

the initiative in determining whether to organize and bargain collectively to the majority of the employees of the craft or class. That initiative is improperly removed from the employees by election procedures which assume—prior to an election—that the choice available to them is only a choice between representatives.

The provisions of the Railway Labor Act upon which the Board bases its election policy and practices do not sustain the Board's interpretation. The Board's conclusion that there is a "mandate of Congress" that representatives be designated by employees apparently is based on Section 2, First and Second, quoted in the Board's letter. Section 2, First and Second, however, do not deal with the question of whether employees shall be represented or, if they do, how they designate their representative. This function is performed by Section 2, Fourth, of the Act, which, as we have already shown, clearly contemplates that the employees themselves can choose whether or not they want to be represented. Section 2, Ninth, which empowers the Board to establish its election procedures, merely gives to the Board authority to provide the proper mechanics to determine whether the majority of the employees desire to exercise the right to organize and bargain collectively guaranteed to them by Section 2, Fourth. In other words, the Board's election procedures cannot properly exceed the scope of Section 2, Fourth, and compel organization contrary to the wishes of the majority.

If the Congress intended that the Railway Labor Act require employees to be represented, that mandate would have appeared in Section 2, Fourth, of the Act, which is specifically concerned with the matter of employee organization and representation. It would be extremely unlikely that a matter so important as a Congressional mandate that employees shall be represented would be found by implication in a section of the Act which does not by its language

even refer to the matter of representation. The language of Section 2, Second, also relied on by the Board, is easily reconcilable with the recognition of a right by employees to deal with a carrier as individuals rather than through collective bargaining representatives. Obviously, Section 2, Second, which provides that "All disputes between a carrier . . . and its employees . . . . shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute" becomes applicable only after the employees and the carrier have designated and authorized representatives. When employees deal with a carrier as individuals, the conference procedure contemplated by Section 2, Second, is simply inapplicable. This is shown by the testimony before the House Committee on Interstate and Foreign Commerce of Commissioner Eastman, draftsman of the 1934 Amendments to the Railway Labor Act. Commissioner Eastman stated that it was not the purpose of the bill which was eventually enacted into law to coerce organization or to require collective bargaining on the part of the employees. Rather, as Commissioner Eastman stated:

> "If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be."

The legislative history of the 1934 Amendments to the Railway Labor Act shows conclusively the Board's present procedures are in direct conflict with the intent of the Congress. It was for that reason that we made several references to the legislative history in our letter of January 18. We know that the Members of the National Mediation Board, like the members of any other administrative agency, would not wish to continue a policy which is in con-

flict with the intent of Congress in the law under which the agency is established and operates. We would, therefore, appreciate the Board's comments on this history since this point was not answered in the Board's reply to United dated January 24.

The Board's reply to our letter of January 18 notes that the *McNulty* case did not order discontinuance of the form of ballot customarily used by the Mediation Board since the Mediation Board was removed as a party to this case during the court proceedings. We did not cite the *McNulty* case as support for the proposition that the Board was ordered by the court to stop using its customary ballot. Our point in raising the *McNulty* case, which we believe is clear from our letter, is that the court in the *McNulty* case recognized that the form of election ballot presently used by the National Mediation Board does not permit a true expression of employee sentiment. In fact, the court in the *McNulty* case considered and rejected the interpretation of the Railway Labor Act that the employees must have representation for collective bargaining. Thus, the court stated:

> "The issue, of course, as the mediator admittedly found, was whether the men desired to continue under the individual contract method or the National Union representation.
>
> • • • • •
>
> "But the employees had no opportunity to express a choice between these methods. They were in effect told that they must have representation for collective bargaining and were asked to elect between the National Union (O. R. T.) and an unknown.
>
> • • • • •
>
> "In short, the ballot is an artificial thing in no wise disclosing which method of contracting the majority wish, but merely shows that, if they must have collective bargaining, they preferred the O. R. T. to some unknown person or organization."

The fact that the National Mediation was, by consent of the parties, dismissed from the suit as a party defendant does not erase the fact that the Board's form of ballot was found by the court to be improper because it did not afford the employees an opportunity to truly express their will.

The balloting policies of the Mediation Board are in striking contrast to those followed by the National Labor Relations Board. The thrust of these sister statutes—the Railway Labor Act and the National Labor Relations Act—has been judicially found to be the same. The National Labor Relations Board, however, has adopted a form of election ballot which gives to employees the right to express their choice as to whether they do or do not want representation. On the other hand, the National Mediation Board has adopted a form of election ballot which effectively denies the employees that right. The completely contrary election procedures used under these companion laws cannot be reconciled.

United Air Lines renews the pleas of Mr. W. A. Patterson's letter of January 22 to the Board. The Mediation Board is urged to review its election procedures with the Attorney General of the United States and the Secretary of Labor to determine whether the Board's present policy and practices are consistent with the intent of Congress and the national labor policy.

Sincerely yours,

/s/ CHARLES M. MASON,
Charles M. Mason,
Senior Vice President—
Personnel.

cc: Honorable Robert F. Kennedy,
Attorney General,
Honorable W. Willard Wirtz,
Secretary of Labor.

Exhibit T

NATIONAL MEDIATION BOARD

Washington

February 7, 1963

Case No. R-3590

Mr. Charles M. Mason, Sr., Vice President
United Air Lines, Incorporated
P. O. Box 8800
Chicago 66, Illinois.

Dear Mr. Mason:

Acknowledgement is made of your letter of February 1, 1963, to Chairman Edwards, on the subject of MMB Case No. R-3590.

The Board sees no useful purpose to be served by continuing the exchange of correspondence concerning the views of United Air Lines, Inc., on the various aspects of the handling of this case. We will, however, comment briefly on two points made in your letter. As stated in our letter of January 24, 1963 it is the Board's view that the Congress intended that the purposes of the Railway Labor Act, expressed in Section 2 (1), General Purposes and Section 2, First and Second, should be effectuated through collective bargaining between carriers and their employees, through duly designated and authorized representatives. Decisions of the United States Supreme Court support this view.

In its decision No. 324, October term 1936, in the case of the Virginian Railway Company vs. System Federation No. 40, Railway Employees Department of the American

Federation of Labor, etc. et al., the Court said, referring to Section 2, Third, of the Railway Labor Act:

> "Under the last mentioned provision this court held, in the *Railway Clerks* case, supra that employees were free to organize and make choice of their representatives without the 'coercive interference' and 'pressure' of a company union organized and maintained by the employer; *and that the statute protected the freedom of choice of representatives, which was an essential part of the statutory scheme,* with a legal sanction which it was the duty of courts to enforce by appropriate decree". (Emphasis supplied)

In the same decision, the Court stated:

> "Petitioner argues that the phrase 'treat with' must be the equivalent of 'treat' in its intransitive sense, as meaning 'regard' or 'act towards' so that compliance with its mandate requires the employer 'to meet with the authorized representative of the employees only if and when he shall elect to negotiate with them'. This suggestion disregards the words of the section *and ignores the plain purpose made manifest throughout the numerous provisions of the Act. Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee.*" (Emphasis supplied)

Again, in the Supreme Court's decision No. 112 and 1023, 1940 term, March 4, 1942, in the case of Williams, etc. et al. v. Jacksonville Terminal Company; Pickett, etc. v. Union Terminal Company, the court said:

> "The object of the Act is to avoid interruption to commerce through *the promotion of free association among employees for the purposes of settling disputes between them and the carriers*" • • • "These additions (Section 2, Seventh and Section 6) *point squarely to limiting the barggining provisions of the Railway Labor Act to collective action.*" (Emphasis supplied)

On Page 2 of your letter you state:

> "The Board's present form of ballot concerns United because it may thwart the desire of the majority of an unrepresented craft or class to remain unrepresented, if that is their desire. The purpose of the Act to promote stable labor relations will not be effectuated by forcing an unwilling majority of employees in a craft or class to have t rates of pay and working conditions established through a process they do not want. A contrary result may well be reached."

You apparently do not have a clear understanding of the Board's election procedures. Succinctly stated, they are: to have a valid election under Section 2, Ninth of the Act, a majority of the employees in the craft or class must cast valid ballots, i.e., ballots for a recognizable organization or an individual not an officer of the carrier. In such a situation, a majority of the valid ballots cast will elect a representative. If no organization or individual receives a clear majority of valid ballots cast, or if less than a majority of eligibles cast valid ballots, there is no election. In the event a majority of eligibles cast valid ballots, and votes are cast for three or more organizations or individuals, and no one receives a majority of the total valid ballots cast, Rule 1206.1 of the Board's rules applies. The situation of "forcing an unwilling majority, etc." is not possible under the above rules and procedures.

The comments on the *McNulty* case made in our letter of January 24, 1963 need not be restated here.

The laws governing this Board and the National Labor Relations Board differ in many respects. The form of ballot used by the NLRB is adapted to the law under which that agency operates. The same applies to the ballot used by the National Mediation Board. We wish to remind you that this Board is an independent agency in the Executive Branch of the Government reporting directly to the Congress. Consultations such as suggested in the last

paragraph of your letter are neither necessary nor appropriate.

The Board will proceed with an election among the employees concerned in NMB Case No. R-3590 under the Board's usual policies and procedures in such cases.

By direction of the National Mediation Board.

/s/ E. C. THOMPSON,
Executive Secretary.

Exhibit U

NATIONAL MEDIATION BOARD

Washington

January 25, 1963

Statement

The National Mediation Board has received a large number of telegrams and letters from individuals and groups signing themselves as employees of United Air Lines, Inc., in connection with NMB Case No. R-3590. This case covers application filed by the Brotherhood of Railway & Steamship Clerks for investigation of a representation dispute among the craft or class of Clerical, Office, Stores, Fleet and Passenger Service Employees of United Air Lines, Inc.

This craft or class was found by this Board in Case No. R-1706 et al. to be the appropriate grouping of these employees for representation purposes under Section 2, Ninth of the Railway Labor Act. Case No. R-3590 is being investigated on that basis. The parties to this dispute are

the Brotherhood of Railway & Steamship Clerks, who invoked the Board's services, and the International Association of Machinists, AFL-CIO, which organization now represents the Stores, Ramp and Fleet Service Employees of United, also a number of employees performing janitorial service. United Air Lines, Inc., is not, and cannot be, a party to this representation dispute.

On September 7, 1962, and January 11, 1963, United Air Lines requested this Board to hold a hearing to establish the proper crafts or classes on United which are involved in this dispute. The Board, on January 17, 1963 replied to United, pointing out the fact that the Carrier is not a party to this matter, and also pointing out that neither of the organizations who are parties to this case have made any request for a hearing on the question of craft or class. The Board, therefore, denied the request of United for such a hearing.

On January 18, 1963 United Air Lines protested the form of ballot customarily used by this Board, and requested that the Board revise its election procedures so that the ballot would contain a space for a vote for no representation. The Board on January 24, 1963 replied to United calling attention to the fact that the Board's present form of ballot, adopted in 1934, was designed to ascertain the representation desires of a carrier's employees for collective bargaining under the Railway Labor Act. The Board's standard form of ballot carries lines for voting for the contesting parties, and a blank line on which a voter may vote for some organization or individual other than those named on the ballot. There is no compulsion that he vote for a contestant for representation.

The Board is making this statement for distribution to

the employees interested in this representation dispute, since it is obviously not possible to answer all the inquiries it has received from individual employees or groups of employees.

The Board's mediators are now on the property proceeding with plans for an election on the above basis.

E. C. THOMPSON,
Executive Secretary.

NLRB 707
(2-62)

Exhibit V.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTION

RIGHTS OF EMPLOYEES

Under Section 7 of the National Labor Relations Act, employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

PURPOSE OF ELECTION

An election by secret ballot will be conducted, under the supervision of the Regional Director of the National Labor Relations Board, among the eligible voters described herein, to determine the representative, if any, desired by them for the purpose of collective bargaining with their employer.

SECRET BALLOT

The election will be by SECRET ballot. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to the Regional Director or his agent in charge of the election. Your attention is called to Section 12 of the National Labor Relations Act:

ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

An agent of the Board will hand a ballot to each eligible voter at the voting place. The voter will then mark his ballot in secret in a voting booth and fold it. The voter will then personally deposit the folded ballot in a ballot box under the supervision of an agent of the Board. A majority of the valid ballots cast will determine the results of the election.

Incorporated herein, for your information only, is a copy of the official ballot.

AUTHORIZED OBSERVERS

Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers will (a) act as checkers at the voting place and at the counting of ballots, (b) assist in the identification of voters, (c) challenge voters and ballots, and (d) otherwise assist the Regional Director or his agent.

ELIGIBILITY RULES

Employees described under VOTING UNIT in this Notice of Election who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off and employees in the military service of the United States who appear in person at the polls shall be eligible to vote. Also eligible are those employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period, and their replacements. Employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than 12 months prior to the date of the election and who have been permanently replaced, shall not be eligible to vote.

CHALLENGE OF VOTERS

The challenge of a voter MUST be made before the voter has deposited his ballot in the ballot box.

INFORMATION CONCERNING ELECTION

The Act provides that only one valid representation election may be held in a 12-month period. Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who desires to raise any question concerning the holding of an election, the voting unit, or eligibility rules may do so by communicating with the Regional Director or his agent in charge of the election.

NAME OF COMPANY

STEPAN CHEMICAL COMPANY
Elwood, Illinois

13-RC-9137
Stipulation

VOTING UNIT

Those eligible to vote are all production and maintenance employees and laboratory employees of the Employer at its Millsdale plant, Elwood, Illinois, who were employed during the payroll period ending January 27, 1963, but excluding office clerical employees, plant clerical employees, professional employees, truck drivers, guards and supervisors as defined in the Act.

TIME AND PLACE OF ELECTION

DATE: February 13, 1963 TIME: 6:30 a.m. to 8:00 a.m. and 2:30 p.m. to 4:00 p.m.

PLACE: Conference room, second floor of lunchroom building

"Employees are asked to vote either before reporting for work of after the end of their particular shift."

UNITED STATES OF AMERICA

National Labor Relations Board

OFFICIAL SECRET BALLOT

SAMPLE

FOR CERTAIN EMPLOYEES OF
STEPAN CHEMICAL COMPANY

Do you wish to be represented for purposes of collective bargaining by

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

81

THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Affidavit

C. P. HUTCHENS, being first duly sworn, on oath deposes and says:

1. I am the Administrative Assistant to the Director of Personnel Field Services, United Air Lines, Inc. ("United"). Prior to June 1, 1961, I was employed by Capital Airlines, Inc. ("Capital") in various capacities, serving from February, 1947 to May, 1951 as Capital's Superintendent of Stations; from May, 1951 to March, 1957 as Executive Assistant to Capital's Vice President Operations and Maintenance; from March, 1957 to November, 1959 as Capital's Manager of Personnel; and from November, 1959 to June, 1961, at which time Capital merged into United, as Capital's Director of Personnel.

2. As Director of Personnel at Capital, I was responsible for among other things assisting in administering the collective bargaining agreement in force between The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Brotherhood") and Capital covering employees classified as "clerical, office, stores, freight and passenger service employees." The duties performed by such employees at Capital were substantially similar to the duties performed by the employees at United designated by the National Mediation Board in R-3590 as eligible to participate in the forthcoming election.

3. The collective bargaining agreement in force between Capital and the Brotherhood until the merger of Capital into United in June, 1961 contained provisions relating to seniority which had the effect of permitting senior

employees, regardless of job classification, to exercise promotional, assignment and displacement rights in other classifications, fitness and ability being sufficient. By virtue of this provision, it became standard practice at Capital for employees with seniority to transfer to job classifications for which they had inadequate experience or qualifications. While Capital had the contract right to refuse transfer on the basis of insufficient "fitness and ability," this right became largely ineffective because of the interpretation of "fitness and ability" as being the minimum ability to perform the work regardless of the retraining required.

4. By reason of this seniority provision, Capital was compelled to retrain persons transferring from one classification to another by virtue of promotion, assignment or displacement. In the period this seniority provision was in effect, Capital incurred great expense in retraining personnel involved in inter-classification transfers. Additionally, since personnel engaged in public contact and sales work required special personality and appearance qualifications, transfers from other classifications by employees lacking such qualifications must have contributed to a decline in Capital's sales.

5. The constant shifting of personnel into classifications for which employees were either unsuited or untrained created administrative problems which were never solved. In the first place, hiring standards for public contact personnel became meaningless when employees not hired for that purpose exercised promotional or displacement rights. Secondly, employee morale and productive inefficiency became serious problems by reason of seniority promotions and assignments from and into classifications having ne functional similarity. Finally, in each case of promotion, reassignment, lay-off or increase in the work force, the possibility had to be considered that the vacancy

thus created would be filled by a person unable to meet job standards.

6. The problems encountered by Capital in attempting to administer three separate functional groups as a single unit—aggravated considerably by a seniority system which ignored functional lines—will inevitably arise at United. Experience at Capital has shown that an improper craft or class determination can have a detrimental impact upon the operations of the carrier. If United is to avoid the detrimental impact suffered by Capital, it will be in its interest to resist any effort to impose upon it a seniority provision which cuts across functional lines and gives rise to the training, hiring, morale and administrative problems with which Capital was plagued. In my judgment, in order to preserve efficiency of operations and high service standards, when faced with a single organization representing two or more diverse groups of employees, a carrier must take a firm position respecting seniority rights. This will lessen rather than contribute to the stable labor relations which the Railway Labor Act was designed to maintain.

/s/ C. P. HUTCHENS.

Subscribed and Sworn To before me this.....day of February, 1963.

.....

Notary Public.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Affidavit

DAVID S. RITNER, being first duly sworn, on oath deposes and says:

1. I am Vice President, Employee Development, United Air Lines, Inc. ("United").

2. The employees of United described as "clerical, office, stores, fleet and passenger service employees," designated by the National Mediation Board ("Board") as the employees eligible to participate in a representation election (R-3590), number approximately 12,700 employees located in approximately 100 cities in 32 states and the District of Columbia. The group embraces employees performing duties in job classification varying from electronic computer operators to ticket agents, to cleaning women.

3. United employs approximately 32,000 persons. A work force of this size requires an organizational and administrative structure geared to resolve difficult problems of supervision, training and productive efficiency. At the heart of United's organizational and administrative system is a careful classification of employees by job function.

4. The Board's "determination" that clerical, office, stores, passenger and fleet service employees constitute a single craft or class is completely inconsistent with United's system of organization. In my judgment, the absence of community of interest existing among employees performing work in such diverse classifications will disrupt United's organizational flexibility by imposing upon it artificial, non-functional criteria. Administrative efficiency and employee morale will decline to the great detriment of United and the public it serves. Over one-third of United's total

work force is involved. The impact, therefore, will be of the most serious nature.

5. The 12,700 employees involved are divided along the following functional lines:

(1) *Office and clerical*: These employees perform duties of an essentially clerical nature and include stenographers, office typists, file clerks, bookkeepers, office machine operators, receptionists, telephone operators, record custodians, ticket examiners, timekeepers, record clerks, rate clerks, and payroll clerks, and kindred employees.

(2) *Public Contact*: This group includes reservation and ticket sales agents, telephone sales agents, vacation booking agents, passenger agents, passenger relations correspondent, station agents, air freight agents, customer services agents and other personnel whose duties are performed primarily with and before the public.

(3) *Ramp and Stores Employees*: Employees in the *ramp* group service aircraft at ramps and terminals involving only the loading, stowing, unloading and pick-up and delivery of all cargo including mail, express, baggage, freight, company material, buffet and food supplies and cabin supplies in accordance with flight loading plans, and the preparation of records in connection therewith; the cleaning of aircraft in connection with through service and operation of automotive and other ramp equipment for servicing aircraft, and may include preparing or helping in the preparation of loading plans, maintaining the ramp area and equipment in a clean, presentable condition, and other general ramp service work. Ramp servicemen may be required to refuel, spot, block, stand fire guard and wave off aircraft when mechanic personnel are not available for the assignment. *Stores* employees per-

form storeroom work including receiving; shipping; checking; inspecting; classifying; issuing; inventorying; storing of supplies, equipment and materials; the operation of stores equipment, including driving of trucks; the preparation and maintenance of required records and reports; the transfer of parts and materials between locations at a Maintenance Base; and other storeroom work.

These groups are separate and distinct, both in their job function and supervision. The hiring qualifications differ for each group. Ramp and stores employees, for example, perform duties of an essentially physical nature, are almost universally male employees, and need not have the training and education expected of clerical or public contact personnel. The clerical personnel are generally female, perform little physical work and rarely deal with the public. Public contact personnel are of both sexes, and perform work requiring personality and appearance standards which differ substantially from the others. For these reasons, there is little identification by one group with the others and no community of interest among them.

6. The Board's announced criteria for craft or class determinations reflect the severe impact an improper determination can have upon a carrier. Thus, the Board emphasizes the "qualifications, duties, and responsibilities of the employees, the nature of their work and their community of interest." In addition, the circumstances of the particular dispute and the relative permanency of employee groupings along craft or class lines on carriers generally are also relevant. The purpose to be served by proper craft or class determinations is the promotion and maintenance of harmonious labor and bargaining relations between the employees, their representative, and the carrier involved. The factors relied on by the Board to determine the appropriate craft or class are the very factors

which are most important to United in devising a smoothly functioning administrative and organizational system.

7. The combining of three diverse groups of employees into one craft or class will force upon United the myriad administrative difficulties which flow from improper employee grouping, and which have a direct impact upon the ability of United to discharge its obligations as an air carrier subject to the Federal Aviation Act. From an administrative viewpoint, a craft or class which embraces diverse groups lacking any cohesive identity of interest raises the same problems as a craft or class which embraces but a part of one group, but in either case efficiency and employee morale suffer.

8. United has a vital interest in any craft or class determination affecting its employees. An improper determination, which ignores the qualifications, duties, and responsibilities of the employees, the nature of their work and their identity of interest, has substantial and adverse impact upon United employees, and thereby on the ability of United to operate in the most efficient manner.

/s/ DAVID S. RITNER.
David S. Ritner.

Subscribed and sworn to before me this ..... day of February, 1963.

.....
Notary Public.

IN THE UNITED STATES DISTRICT COURT

For the District of Columbia

United Air Lines, Inc., *Plaintiff*,

v.

National Mediation Board, et al., *Defendants*.

Civil No. 402-63

Motion of Defendants to Dismiss the Complaint or, in the Alternative, For Summary Judgment.

Come now defendants, by their attorneys, and move to dismiss the complaint or, in the alternative for summary judgment, upon the grounds that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law in that:

1. The Court is without jurisdiction over the subject matter; and

2. Plaintiff lacks standing to maintain this action; and

3. The complaint fails to state a justiciable controversy and

4. Plaintiff is not entitled to injunctive relief since

(a) the action is premature;

(b) plaintiff does not demonstrate irreparable injury; and

(c) the action taken by the National Mediation Board is not erroneous,

and in support thereof the Court is referred to the affidavit of Eugene C. Thompson, Executive Secretary of the Na-

tional Mediation Board, dated March 5, 1963, the exhibits attached thereto, and the memorandum of points and authorities, all attached hereto and made a part hereof.

JOHN W. DOUGLAS,
Acting Assistant Attorney General,

DONALD B. MACGUINEAS,
Attorney, Department of Justice,

HARLAND F. LEATHERS,
Attorney, Department of Justice,

RICHARD S. BEATTY,
Attorney, Department of Justice,
Attorneys for Defendants.

Affidavit

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss.

EUGENE C. THOMPSON, being first duly sworn, deposes and says:

1. I am the Executive Secretary of the National Mediation Board, and as a part of my official duties have custody of the Board's files and records. I have examined the Board's files and records relating to NMB Case No. R-3590 involving representation of Clerical, Office, Stores, Fleet and Passenger Service employees of United Air Lines, Inc. (hereinafter referred to as United), and find the following information therein concerning this case.

2. On August 24, 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (AFL-CIO), (hereinafter referred to as BRC) filed application pursuant to Section 2, Ninth, of the Railway Labor Act, amended (45 U.S.C.A. 152.9) for investi-

gation of a representation dispute among the craft or class of employees of United "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes." As a result of preliminary examination to which all such applications are subject, the craft or class designation above stated was questioned by the Board in letter dated August 27, 1962, (copy attached marked Exhibit 1) to Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks. Mr. Harrison's explanation of the craft or class designation shown in his application was contained in letter to the Board dated August 27, 1962. (Copy attached to Mr. Mason's affidavit marked Exhibit A).

3. On August 30, 1962, United and the International Association of Machinists (hereinafter referred to as IAM) were advised of this application and requested to submit their statements in respect thereto. United was also requested to furnish the total number of employees covered by this application. (Copy attached to Mr. Mason's affidavit as Exhibit B).

4. On September 7, 1962, United responded to our letter of August 30, 1962, (copy attached to Mr. Mason's affidavit as Exhibit C) stating it is the carrier's position that the BRC application involved only a party of a group of employees which the Board had found to constitute a craft or class, and it should, therefore, be dismissed. The carrier also advised they would not, at that time, furnish the number of employees involved. On September 11, 1962, the IAM replied to our letters advising that in their opinion the craft or class covered by the BRC application did not conform to the Board's findings, particularly as set forth

in NMB Case No. R-1706, et al., (copy attached to Mr. Mason's affidavit as Exhibit E),

5. The BRC, on October 5, 1962, amended its application to cover the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service employees (copy attached to Mr. Mason's affidavit as Exhibit G). After further exchange of correspondence with United and IAM, the amended application, covering the craft or class of Clerical, Office, Stores, Fleet and Passenger Service employees, as established in determination issued by this Board in Case No. R-1706, et al., dated January 31, 1947, (copy attached marked Exhibit 2) was docketed as NMB Case No. R-3590, on November 8, 1962.

6. Mediator William F. J. Klatte was assigned to conduct an investigation of this case commencing November 19, 1962. This investigation consisted of checking the authorization cards furnished by the BRC in support of their application against a list of employees furnished by the carrier for that purpose. On December 19, 1962, the National Mediation Board authorized an election be conducted among the employees involved based on Mediator's report that his investigation showed sufficient evidence to warrant finding that a representation dispute existed among these employees under the Board's rules. (Copy attached marked Exhibit 3. See Part 1206).

7. On December 19, 1962, prior to recessing this case for the holidays and to allow the Mediator to attend the Board's Annual staff meeting, the Mediator advised the officers of United that the National Mediation Board had ordered an election among the employees in question and requested a list of employees involved showing names, occupations, locations, and home mailing addresses to be ready when the Mediator returned on January 14, 1963. Upon his return on January 14, 1963, the Mediator inquired about the status of the preparation of this list, and was

informed the carrier had decided the request for this list was premature in the absence of a ruling from the Board on United's request, dated September 7, 1962, that a public hearing be held to establish the proper craft or class of employees involved in this case. The company renewed this request in letter dated January 11, 1963. (Copy attached to Mr. Mason's affidavit as Exhibit K). After consideration of this letter the Board replied under date of January 17, 1963, (copy attached to Mr. Mason's affidavit as Exhibit L) calling attention to the fact that in the Board's opinion the carrier is not, and cannot be, a party to this representation dispute. This opinion is based on the National Mediation Board's policy, formulated early in the Board's history under the 1934 amendments to the Railway Labor Act, which has been enunciated many times in our annual reports and communications to rail and air carriers subject to the Act.

8. Our letter of January 17, 1963, also denied the carrier's request for a hearing on the craft or class established under Case No. R-1706, et al., for the reason that the carrier is not, in the Board's view, a party to this representation dispute. The Board also called attention to the fact that no such request had been received from either party to this dispute, namely, the BRC and the IAM. On January 25, 1963, (copy attached to Mr. Mason's affidavit as Exhibit M) the carrier addressed a letter to Chairman Edwards asking the Board to reconsider its denial for a hearing contained in our letter of January 17, 1963. In executive session on January 31, 1963, the Board gave full consideration to the position of the carrier with respect to the craft or class of employees involved in this dispute, and on February 4, 1963, addressed a letter to the carrier fully outlining its reason for again denying their request for a hearing on the craft or class (copy attached to Mr. Mason's affidavit as Exhibit N).

9. On January 18, 1963, United addressed a letter (copy attached to Mr. Mason's affidavit as Exhibit O) to Board Member O'Neill taking the position the Board should use a form of ballot which would provide a space for a vote for "no representation". The Board replied on January 24, 1963 (copy attached to Mr. Mason's affidavit as Exhibit R), advising the Board sees no reason to deviate from its customary form of ballot in the current dispute. This form of ballot has been used by the Board in over 3,400 representation elections among various crafts or classes of railroad and airline employees since 1934, among which were several elections involving other classes of United employees, at which times the company made no objection to the form of ballot such as they have now raised. On February 1, 1963, the carrier wrote Chairman Edwards (copy attached to Mr. Mason's affidavit as Exhibit S) referring to our letter of January 24, 1963, and requesting reconsideration of the decision made in our letter to the carrier of January 24, 1963, supra. This request was again given careful consideration by the Board and under date of February 7, 1963, the Board replied to the carrier (copy attached to Mr. Mason's affidavit as Exhibit T) reiterating their reasons for denying the carrier's request for a change in the form of ballot.

10. During this exchange of correspondence the Mediator was in Chicago waiting for the carrier to furnish the list of employees which would enable him to proceed with plans for conducting the election. On February 4, 1963, the Mediator again inquired about the status of preparation of the eligible list and was advised by the carrier that the task was a large one and the list would not be completed until approximately February 11, 1963. On that date the Mediator further inquired concerning the status of the list and was advised by the carrier's officers that they had decided to decline to prepare and furnish the list. The

carrier so notified this office by letter of same date (copy attached marked Exhibit 4). The list referred to in the second paragraph of the carrier's letter of February 11, 1963, is the one furnished the Mediator on November 27, 1962, for checking the authorization cards submitted by the BRC in support of their application and contained only the names, occupations and locations of the employees, but did not include the mailing addresses which would be required to conduct the election. The list containing the mailing addresses is the one which the carrier has refused to furnish. It will be noted the carrier advised that if the Board wished to exercise its statutory authority to make copies of relevant "books and records" of the company (Section 2, Ninth, of the Railway Labor Act, copy attached marked Exhibit 5), they would make them available to the Board's representatives at the carrier's executive offices. On February 12, 1963, the Board directed its Mediator to secure this information from the carrier's records, and he is now so engaged. On February 14, 1963, a petition dated February 11, 1963, was received from the Association for the Benefit of Non-Contract Employees purporting to represent 5,100 employees in the Customer Contact and Office and Clerical group of United. The petitioners applied for leave to intervene in Case R-3590 as a party at interest on behalf of the employees they purport to represent, and made four specific requests described on pages 2 and 3 of the petition, copy of which is attached marked Exhibit 6. The petitioners did not, however, ask leave to intervene as a candidate for representation of the employees in the craft or class involved under the Board's Rule 1206.5. Further, an examination of the authorization cards submitted by the petitioners shows the following language preceding the signature of the employee:

"I hereby authorize the hereinafter named persons

to act in my behalf as incorporators and directors for the purpose of forming and directing the affairs of a corporation to be known as an 'Association for the Benefit of Non-Contract Employees' of which I shall be a member.

"These same individuals are hereby authorized and empowered to represent me before the National Mediation Board.

"The execution of this instrument revokes any authorizations heretofore made for the appointment of a representative."

It will be observed that this language does not authorize the "Association for the Benefit of Non-Contract Employees" to represent the signatory employee for the purposes of collective bargaining under the Railway Labor Act, but only to "represent me before the National Mediation Board." As of this date the Board has taken no action on this petition.

11. The statement in paragraph 7 of the complaint that the Board stated that it would have conducted a hearing if requested to do so by a party to the proceeding, is based on a misapprehension of the Board's position, as stated in its letter of February 4, 1963. The Board has given careful consideration to whether or not a hearing is required for the purpose of determining the composition of the craft or class, and has concluded for the reasons stated in the February 4, 1963 letter that there is no necessity for holding such a hearing for the purposes of an election in this dispute.

12. Mr. Mason, beginning at paragraph No. 11 of his affidavit, protests the form of ballot used by the National Mediation Board in representation elections. This form of ballot was first authorized by the United States Railroad Labor Board in its Decision No. 218, dated July 26, 1921 (copy attached marked Exhibit 7). The ballot was later revised by the U. S. Railroad Labor Board in its Decision

No. 418, dated November 19, 1921, by omitting identifying information (copy attached marked Exhibit 8).

Following the creation of the National Mediation Board on June 21, 1934, the Board on August 4, 1934, formulated and approved rules for conducting representation elections. The ballot sanctioned by this action is attached marked Exhibit 9. The Board authorized a modification in this ballot effected July 1, 1956, copy of which is attached marked Exhibit 10.

13. The Board does not issue a certification after a representation election has been held unless a majority of these eligible to participate in the election have cast valid ballots. A valid ballot is one that is marked to indicate that the voter desires to be represented by one of the contesting organizations, or by a representative designated by the voter in the space provided on the ballot. If a ballot is blank, or is marked by the voter to indicate he does not desire representation, it is not counted as a valid ballot in determining that a majority of those eligible have participated in the election.

14. The certification is issued by the Board in compliance with its duty under Section 2, Ninth, of the Act to certify the duly designated and authorized representative of the employees in the craft or class with whom the carrier shall treat for the purposes of the Act. A sample form of certification is attached as Exhibit 11. The conditions referred to in Mr. Mason's affidavit, paragraph 17, and Mr. Hutchens' affidavit may result from the terms of the collective bargaining agreement entered into between the carrier and the duly designated and authorized representative named in the certification, but do not flow automatically from the issuance of the certification itself.

15. In paragraph 20 of Mr. Mason's affidavit mention is made of the Board's Cases R-2783, C-2252 and C-2389. The Board, in these cases, because of the unique circumstances,

exercised its discretionary authority in relation to the craft or class and authorized a vote among Stock Clerks as the most effective way to implement the purposes of the Act. In subsequent cases; the full craft or class of Clerical, Office, Stores, Fleet and Passenger Service employees as set forth in Case No. R.-1706, et al., was used in elections held under Cases R-2953, R-3013, R-3048, R-3105, R-3119, R-3165, R-3191, R-3222, R-3256, R-3278, R-3283, R-3307, R-3347, R-3365, R-3399, R-3416, R-3488, R-3535, and R-3555.

.....

E. C. THOMPSON, *Executive Secretary.*
National Mediation Board.

Subscribed and sworn to before me this.....day of.....

.....

/s/ by Notary.

Exhibit No. 1

August 27, 1962

Mr. George M. Harrison,
Grand President
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employes
Brotherhood of Railway Clerks Building,
Cincinnati 2, Ohio

Dear Mr. Harrison:

This will acknowledge your letter dated August 24, 1962, attaching representation application covering "Commonly known as clerical, office, stores (excluding stores employes represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employes represented as of August 24, 1962, by the International Association of Machinists) and passenger service employes," employees of United Air Lines, Inc.

We observe from the craft description that stores employees represented as of August 24, 1962, by the International Association of Machinists, and fleet service employees represented by the same Association as of the same date, are excluded from the application.

Please advise us of the significance of the date contained therein. Is it the position of your organization that employees hired in the excluded categories after August 24, 1962, would be covered by the application?

Very truly yours,

E. C. THOMPSON,
Executive Secretary

Exhibits 2 and 3 omitted.

Exhibit No. 4

UNITED AIR LINES
1200 Algonquin Road, Elk Grove Township, Illinois
Mailing Address: P. O. Box 8800, Chicago 66, Illinois
Telephone 625-1400

February 11, 1963

Executive Offices
Mr. E. C. Thompson
Executive Secretary
National Mediation Board
Washington, D. C.

Dear Mr. Thompson:

We acknowledge receipt of your letters dated February 4 and February 7, 1963, denying United's request that a public hearing be held in Case R-3590 to permit submission of evidence to the National Mediation Board, upon which the Board could base a determination of the proper grouping of employees for purposes of a representation election, and denying our request to change the form of ballot used by the Board.

You stated that United has not furnished the Mediator a list of employees involved and request that United prepare and furnish such a list. We cannot agree with this statement because United did furnish a list of employees to the Mediator on November 27, 1962. A subsequent request for an additional list was also made by the Mediator and, to date, that request has not been complied with.

We believe the Board's refusal to permit United to be a party and to hold a hearing is a denial of the minimal constitutional requirements of due process. We, therefore, plan to institute legal proceedings seeking an appropriate

court order requiring the Board to provide for a proper hearing and to change the form of ballot in Case R-3590.

Pending the outcome of such litigation, United respectfully declines to prepare and furnish the additional list requested. If, in the meantime, the Board wishes to exercise its statutory authority to make copies of relevant "books and records" of the Company, we will make them available to the Board's representative at our Executive Offices.

Very truly yours,
/s/ C. M. Mason,
Senior Vice President—Personnel.

cc: Mr. G. M. Harrison
Mr. A. J. Hayes
Mr. W. F. J. Klatte
Hon. Robert F. Kennedy, Attorney General
Hon. W. Willard Wirtz, Secretary of Labor

Exhibit 5 omitted.

Exhibit No. 6

February 11, 1963

Mr. Leverett Edwards, Chairman
National Mediation Board
Washington 25, D. C.

Re: Case R-3590.

Association for the Benefit of Non-Contract Employees.

Dear Sir:

We submit herewith on behalf of the Association for the Benefit of Non-Contract Employees and the five undersigned individuals a Petition for Relief before the National Mediation Board as follows:

1. The petitioners herein and the Association for the Benefit of Non-Contract Employees, as of this date, represent 5100 employees, in the Customer Contact and Office and Clerical group, of United Air Lines. This representation is evidenced by signed representation cards from each of said employees.

2. The petitioners hereby apply for leave to intervene in National Mediation Board Representation Case R-3590, as a party in interest on behalf of the 5100 employees who have appointed the petitioners. In addition to being granted permission to intervene, the undersigned do further request the following specific action from the National Mediation Board.

(a) That the pending election in case R-3590 be deferred until there be a re-determination of the class or craft of employees to be involved in the election.

(b) That the National Mediation Board, basing its action on information already before it, make a redetermination of the employees presently in the bargaining unit into three groups comprised of:

1. Office and clerical employees.
2. Customer contact employees.
3. Ramp and stores employees.

each of which should be determined to be a separate class or craft for purposes of this representation case, and for future representation proceedings involving these employees.

(c) In the event that insufficient facts are presently on file or if the Board declines to re-determine the class and craft on its own motion, the undersigned hereby petition the National Mediation Board to fix a time and place for a hearing, at which petitioners and all interested parties and persons may present evidence, argument and authorities bearing on that issue; and that on the evidence thus pre-

sented, the National Mediation Board re-determine the class and craft as requested.

(d) In addition to the foregoing and notwithstanding the ultimate determination of class and craft of the National Mediation Board in Case R-3590 petitioners hereby request the National Mediation Board to prepare and use in this representation election, a form of ballot which provides on its face, a place for employees to vote affirmatively that there be no bargaining agent elected to represent their class or craft. This request is based on National Mediation Board practice of using ballots which provide the voter only the opportunity of choosing between bargaining agents.

(e) In the event that the National Mediation Board declines to use a ballot as requested, (i.e. a ballot providing a place for a "no-union" vote), then petitioners request the Board to issue a statement to petitioners, in advance of the election, explaining how a voter may register as his choice that no union be certified to represent him.

3. The request for re-determination of the class and craft is based upon numerous reasons, including the following, each of which will be proved by petitioners with appropriate evidence and authority in the event of a hearing. (1) The class and craft heretofore established by the National Mediation Board for this election includes approximately 12,500 employees of United Air Lines in widely different job categories. There is no history of collective bargaining common to these diverse groups. In fact, one group (ramps and stores) is presently unionized, while the others (customer contact and office and clerical) have never been unionized in the system. (2) Determination of customer contact and office and clerical employees to be separate classes and crafts is easily accomplished because they are readily identifiable units under both company personnel procedures and nature of work performed.

(3) The National Mediation Board determination in R-1706, January 31, 1947 was prior to the significant post war operational developments of the airlines industries. These developments show that office and clerical, ramp and stores employees and customer contact employees are separate classes and crafts and should be treated as such. (4) The employees in these classes and crafts do not desire to be joined in one bargaining unit. (5) There is widely different job-training in the different job categories. (6) The nature of their work is significantly different. (7) There is no aspect of interchangeability of personnel between the different job classifications. (8) Vital interests of each category prevents fair representation of all three groups by one bargaining agent without a serious conflict of interest or a potential conflict of interest.

Copies of this petition are being sent to the Brotherhood of Railway Clerks, International Association of Machinists and United Air Lines. It is requested that all communications regarding this petition be sent to the undersigned in care of the Association for the Benefit of Non-Contract Employees, 244 Kearny Street, San Francisco, California.

Respectfully submitted,

JAMES K. LAMONA,
RALPH C. JOHNSON,
PHYLLIS RUFFNER,
PATRICIA H. LEAHY,
HELEN M. CRISMAN,
Association for the Benefit of Non-Contract Employees,
By JAMES F. SHEAHAN,
President.

Exhibit 7

Pennsylvania System Machinists' Apprentices', and Helpers' Official Ballot

A dispute exists between the carrier and System Federation No. 90 of the Railway Employees' Department of the A. F. of L. as to who the employees in the craft above named desire to be represented by in the conference to negotiate rules and working conditions.

The machinists, apprentices, and helpers, irrespective of membership or non-membership in any organization, are therefore to be given an opportunity to designate, by a majority vote, the representation of their choice, as follows:

Those in favor of either of the following will designate their choice by marking an X in the square set out for that purpose.

Those who desire to be represented by System Federation No. 90, Railway Employees' Department of the A. F. of L., mark an X in this square.....☐

Those who desire to be represented by the American Federation of Railroad Workers, mark an X in this square .....☐

Those who desire to be represented by individuals or by any other organization, write the name of such individual or organization here.....☐

.....

and mark an X in this square.

Place employed .....

Craft .....

Actually working .....

Laid off or furloughed .....

Name of voter .....

Exhibit No. 8

Long Island Railroad Company Crossing Watchmen. Official Ballot

A dispute exists between the carrier and the United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers as to whom the crossing watchmen desire to be represented by in conference to negotiate rules and working conditions.

The crossing watchmen, irrespective of membership or nonmembership in any organization, are to be given an opportunity to designate by a majority vote the representatives of their choice as follows:

Those in favor of either of the following will designate their choice by marking an X in the square set out for that purpose:

Those who desire to be represented by the Long Island Railroad Crossing Watchmen's Association, mark an X in this square ..... ☐

Those who desire to be represented by the United Brotherhood of Maintenance of Way Employees and Railway Shop Laborers, mark an X in this square..... ☐

Those who desire to be represented by individuals or by any other organization, write the name of such individual or organization here .....
..... ☐
and mark an X in this square.

Exhibit No. 9

OFFICIAL BALLOT

of

MECHANICAL DEPARTMENT EMPLOYEES OF
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

June 4-18, 1934

Dispute exists with respect to representation of the Mechanical Department employees as to whether a majority desire representation by the Association of Mechanical Crafts, Helpers and Apprentices, D. & R. G. W. R. R., or desire representation by System Federation No. 10, Railway Employees' Department, American Federation of Labor, and it has been agreed that a secret ballot be taken to determine the fact.

If You Desire Representation by the Association of Mechanical Crafts, Helpers and Apprentices, D. & R. G. W. RR., Mark an "X" in This Square..... ☐

If You Desire Representation by System Federation No. 10, Railway Employees' Department, American Federation of Labor, Mark an "X" in This Square... ☐

If You Desire Representation by Any Other Organization or Individual, Write in Name and Mark an "X" in This Square..... ☐

[The writing of more than one X will make the ballot illegal]

Do Not Sign Your Name

Exhibit No. 10

OFFICIAL BALLOT

of

SHEET METAL WORKERS, HELPERS AND APPRENTICES

employees of

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO.

R-2962

June 1956 to July 1956

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, and the National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized as representatives for purposes of the Act.

INSTRUCTIONS FOR VOTING.

Mark an "X" in the square of your choice. Marks in more than one square make ballot void.

If you desire to be represented by:
Sheet Metal Workers' International Association
(Functioning through System Federation No. 76, Railway Employes' Department, AFL)
Mark an "X" in this square..... ☐

If you desire to be represented by:
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of U. S. and Canada—AFofL.
Mark an "X" in this square..... ☐

If you desire to be represented by:
Any Other Organization or Individual
Write name of such organization or individual on the line below,

.....AND,

Mark an "X" in this square..... ☐

NOTICE.

1. This is a SECRET BALLOT. Do not sign your name.

2. Return this ballot in its entirety. Do not cut, mutilate or otherwise spoil it. If you do so, return ballot at once to the Mediator and obtain a new one.

Exhibit No. 11

NATIONAL MEDIATION BOARD

Washington

In the matter of Representation of Employees of the Southern Airways, Inc. Clerical, Office, Fleet and Passenger Service Employees	Case No. R-2953. February 13, 1956.

Dismissal.

The services of the National Mediation Board were invoked by the Air Line Agents Association, International, to investigate and determine who may represent for purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, Clerical, Office, Fleet and Passenger Service Employees, employees of the Southern Airways, Inc.

At the time application was received, these employees were not represented by any organization or individual.

The Board assigned mediator A. Alfred Della Corte to investigate.

FINDINGS.

The investigation disclosed that a dispute existed among the employees concerned and by direction of the Board, the mediator conducted an election by U. S. mail ballot, using an agreed to eligible list to determine the employee's representation choice.

The following is the result of the election as reported by Thomas A. Tracy, who was assigned to count the ballots in

this case and attested on July 22, 1955, by a representative of the applicant organization.

Number of employees voting:

	Air Line Agents Association, Int'l.	Any Other Org. or Individual	Void Ballots	Number of Employees Eligible
Clerical, Office, Fleet and Passenger Service Employees	42	0	0	207

The National Mediation Board further finds that the carrier and employees in this case are respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein, and that the interested parties were given due notice of investigation, whereupon the National Mediation Board finds that:

On the basis of the investigation and report of election, which shows that less than a majority of eligible employees participated in the election, the National Mediation Board finds no basis for Certification and the application is therefore dismissed.

By order of the National Mediation Board.

E. C. THOMPSON,
Executive Secretary.

NATIONAL MEDIATION BOARD

Washington

In the Matter of Representation of Employees of the Aloha Airlines, Inc. Clerical, Office, Stores, Fleet and Passenger Service Employees	Case No. R-3535. March 16, 1962.

Certification.

The services of the National Mediation Board were invoked by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Clerical, Office, Stores, Fleet and Passenger Service Employees, employees of Aloha Airlines, Inc.

At the time application was received, these employees were represented by the International Association of Machinists, AFL-CIO, Airline Division.

The Board assigned Mediator Clarence G. Eddy to investigate.

FINDINGS,

The investigation disclosed that a dispute existed among the employees concerned and by direction of the Board, the mediator was instructed to conduct an election by secret ballot, using an agreed to eligible list to determine the employees' representation choice.

The following is the result of the election as reported by the mediator and attested on March 8, 1962, by representatives of the contesting organizations who acted as observers.

Number of employees voting:

	International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America	International Association of Machinists, AFL-CIO, Airline Division	Void Ballots	Number of Employees Eligible
Clerical, Office, Stores, Fleet and Passenger Service Employees	93	97	1	212

The National Mediation Board further finds that the carrier and employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdition over the dispute involved herein; and that the interested parties were given due notice of investigation.

CERTIFICATION.

Therefore, the National Mediation Board certifies that the International Association of Machinists, AFL-CIO, Airline Division, has been duly designated and authorized to continue to represent for the purpose of the Railway Labor Act, the craft or class of Clerical Office, Stores, Fleet and Passenger Service Employees, employees of Aloha Airlines, Inc., its successors and assigns.

By order of the National Mediation Board.

E. C. THOMPSON,
Executive Secretary.

IN THE UNITED STATES DISTRICT COURT

For the District of Columbia.

United Air Lines, Inc., *Plaintiff*, *vs.* National Mediation Board; Leverett Edwards, Individually and as Chairman of the National Mediation Board; Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board, *Defendants.*	Civil Action No. 402-63.

Supplemental Affidavit of Charles M. Mason in Support of Plaintiff's Motion for Preliminary Injunction.

STATE OF ILLINOIS
COUNTY OF COOK } ss.

CHARLES M. MASON, being first duly sworn, on oath deposes and says:

1. I am Senior Vice President, Personnel, United Air Lines, Inc. ("United").

2. The original petition filed with the National Mediation Board ("Board") on August 24, 1962, by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Brotherhood") pursuant to Section 2, Ninth of the Railway Labor Act, alleged that there was a representation dispute among a craft or class of employees consisting of United's clerical, office, stores, fleet and passenger service employees. That petition expressly excluded from the proposed craft or class all of the stores and fleet service (ramp and store) em-

ployees represented at United by the International Association of Machinists (I. A. M.) as of August 24, 1962.

3. On October 5, 1962, the Brotherhood amended its original statement of the craft or class to substitute a comprehensive group of United employees described as "clerical, office, stores, fleet and passenger service employees" without exclusion of any of the ramp and store employees represented by the I. A. M.

4. I am informed and believe, and upon such information and belief, state that the Brotherhood and the I. A. M. subsequently discussed the composition of the craft or class with the Board and the Board advised them that if the two unions would agree to exclude from the craft or class the ramp and store employees then represented by the I. A. M., the Board would proceed to conduct an election among the remaining employees in the craft or class described in the Brotherhood's amended petition. This belief is based upon a letter dated November 30, 1962 from Mr. Frank Heisler, Air Line Coordinator, I. A. M. to Mr. C. L. Dennis, Grand Vice President, B. R. C. (a copy of which is attached hereto as Exhibit A) stating, in pertinent parts as follows:

> "After discussing this matter further with the National Mediation Board, we were assured that if an agreement could be reached between your Organization and our Organization, which would exclude all employees in the craft or class presently represented by our Organization, the Board would conduct an election among the remaining employees in the craft or class without establishing a precedent that could be used by any other organization on any other property. You were advised that our Organization would be agreeable to entering into such an agreement; furthermore, that if such an agreement were entered into that the members of our Organization employed by United Air Lines would render all possible assistance to your Organization in the event that an election was conducted among those employees of United Air Lines not presently represented by any organization."

5. Copies of Exhibit A were distributed by the Brotherhood during the course of its election campaign to ramp and store employees represented by the I. A. M. together with a cover letter (a copy of which is attached hereto as Exhibit B) from Mr. Patrick T. Clancy, Chairman, Air Transportation Division, B. R. C.-U. A. L. Organizing Committee.

6. I am informed and believe, and upon such information and belief state that the Brotherhood and the I. A. M. failed to agree that the employees represented by the I. A. M. should be excluded from the craft or class. Accordingly, the Board has indicated that it will proceed to conduct an election in accordance with the craft or class designation contained in the Brotherhood's amended petition.

CHARLES M. MASON.

Subscribed and sworn to before me this .....day of ....., 1963.

.....

Notary Public.

Exhibit A

INTERNATIONAL ASSOCIATION OF MACHINISTS
1300 Connecticut Ave. Washington 6, D. C.

Office of the General Vice President

Adams 2-6309

49-United

November 30, 1962,

Subj: United Air Lines, Inc., Representation Case, No. R-3590.

Mr. C. L. Dennis,
Grand Vice President,
Brotherhood of Railway and Steamship Clerks,
9 South Clinton St., Room 818,
Chicago 6, Illinois.

Dear Mr. Dennis:

As you will recall during our meeting of November 19, 1962 in the Americana Motel, Des Plaines, Illinois, which was also attended by our Grand Lodge Representative Paul Burnsky, we reviewed in detail all of the aspects pertaining to the application filed by your Organization with the National Mediation Board involving the craft or class of Clerical, Office, Stores, Fleet and Passenger Service employees on United Air Lines.

As the record will reveal, your original application appeared to exclude certain employees as represented by our Organization. In view of the attempt on the part of the Teamsters Organization to raid our Organization on other air carriers involving a part of the aforementioned

craft, or class, our Organization took the position with the National Mediation Board that your original petition did not conform with the Board's findings as established in Case 1706, et al.

Subsequent thereto, after a considerable exchange of correspondence, your Organization amended its original petition to include the entire craft or class of Office, Stores, Fleet and Passenger Service employees, which would in fact cover all of the employees presently represented by our Organization, involving certain classifications such as Stock and Stores employees, Ramp Service Employees and Janitorial employees.

After discussing this matter further with the National Mediation Board, we were assured that if an agreement could be reached between your Organization and our Organization, which would exclude all employees in the craft or class presently represented by our Organization, the Board would conduct an election among the remaining employees in the craft or class without establishing a precedent that could be used by any other organization on any other property. You were advised that our Organization would be agreeable to entering into such an agreement; furthermore, that if such an agreement were entered into that the members of our Organization employed by United Air Lines would render all possible assistance to your Organization in the event that an election was conducted among those employees of United Air Lines not presently represented by any organization.

You advised that you would give consideration to the aforementioned suggestion, but that you would have to clear the matter with your general headquarters in Cincinnati. On the afternoon of November 20, 1962, at approximately 3:30 P.M., you called me at the Americana Motel and advised me of your discussions with Grand President Harrison and that it was his decision that your

Organization could not agree to the proposal as submitted to you on November 19th. You further advised that it was the intent of your Organization to proceed in behalf of the entire craft or class of Office, Clerical, Stores, Fleet and Passenger Service employees, which would include those employees presently represented by our Organization.

Please advise as to whether or not the contents of this letter generally covers our discussion.

Fraternally yours,
FRANK HEISLER,
Airline Coordinator.

cc: Burnsky,
FH/ac.

Exhibit B

AIR TRANSPORT DIVISION,
BROTHERHOOD OF RAILWAY CLERKS.
1015 Vine Street,
Cincinnati 2, Ohio.

Geo. M. Harrison, *Grand President*

To I. A. M. Members on U. A. L. in The Ramp Service, Stores, Janitors, Cleaning Women and Station Wagon Drivers' Groups.

Hi . . .

Did J. L. Reeves deliberately lie to you, his membership, in "Reeves' Rantings" (No. 21-62) or was this just another case of him being uninformed?

Perhaps the I. A. M. just doesn't give him all of the information figuring he wouldn't know what to do with it anyway.

They sure have nerve asking you to support them when the best they can offer you as a General Chairman is either a deliberate liar or such a dimwit they don't even keep him informed—maybe he's both and they are aware of it.

We are attaching hereto a copy of a letter to our Vice-President, C. L. Dennis, from Mr. Heisler, I. A. M. Airline Co-ordinator, under date of November 30, 1962. This letter covers the situation in a general way and paragraphs 4 and 5 prove Reeves a liar, as it was written prior to December 21, 1962, on which date he issued "Reeves Rantings" (No. 21-62).

We are sure that after you read it you will support our organization while you wonder just what Reeves is doing in the labor movement.

This is the first—and we hope the last—of these letters, as we would rather work at organizing our class or craft on United than waste time arguing with the Reeves' of the Labor Movement to the great delight of the airline officials.

Sincerely and fraternally,

PATRICK T. CLANCY, *Chairman*,
Air Transport Division, B.R.C.
U.A.L. Organizing Committee.

Affidavit.

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss.

FRANCIS A. O'NEILL, JR., being first duly sworn, deposes and says:

1. I am a Member of the National Mediation Board, and as a part of my official duties, am familiar with the representation dispute among certain employees of United Air Lines, Inc. (United) covered by Board Case R-3590, and make this affidavit in reply to the affidavit of Charles M. Mason, executed March 14, 1963.

2. During November 1962, I had discussions with Mr. Frank Heisler, Airline Coordinator of the International Association of Machinists (IAM), concerning the composition of the craft or class of United's employees covered by the application for the Board's services made by the Brotherhood of Railway and Steamship Clerks (BRC) in this case. I do not recall any discussions of this subject with Mr. C. L. Dennis, Vice Grand President of the BRC. I am not aware of any discussions of this subject between the other member of the Board, Chairman Leverett Edwards, and Messrs. Heisler and Dennis, nor with anyone in an official capacity with the Board. The Board at that time consisted of two members, the third membership being vacant due to resignation of Mr. Robert O. Boyd, effective October 14, 1962.

3. In my discussion with Mr. Heisler of the IAM, I advised him that if the two unions would agree to exclude from the craft or class in dispute the ramp and stores employees then represented by the IAM, the Board would give consideration to that situation in connection with any election that might be held under Case R-3590. A deci-

sion on this question would require action by a quorum of the Board. Since no agreement was made between the two unions, the question did not come before the Board for action.

FRANCIS A. O'NEILL, JR.

Subscribed and Sworn To before me this 20th day of March 1963.

WILLIAM B. BINSWANGER.

UNITED STATES DISTRICT COURT

For the District of Columbia

United Air Lines, Inc.,
Plaintiff,
vs.
National Mediation Board, et al.,
Defendants.
Civil No. 402-63.

Order

Upon consideration of defendants' motion to dismiss or in the alternative for summary judgment, plaintiff's motion for preliminary injunction, and the Court having considered the pleadings, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to said motions, and after hearing oral argument by counsel for the respective parties in open court, and the Court having determined that there is no genuine issue of material fact it is by the Court this 25th day of March, 1963,

ORDERED: that defendants' motion for summary judgment be, and the same is, hereby granted; and the complaint be, and the same hereby is, dismissed with prejudice, and it is

FURTHER ORDERED: that plaintiff's motion for preliminary injunction be, and the same hereby is dismissed as moot.

BURNITA SHELTON MATTHEWS,
United States District Judge.

Seen
STUART BERNSTEIN.

IN THE UNITED STATES DISTRICT COURT
For the District of Columbia

United Air Lines, Inc.,
Plaintiff,
vs.
National Mediation Board; Leverett Edwards, Individually and as Chairman of the National Mediation Board; Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board,
Defendants.

Civil Action No. 402-63.

Notice of Appeal

Notice is hereby given this 27th day of March, 1963, that plaintiff United Air Lines, Inc. appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered March 25, 1963, granting defendants' motion for summary judgment.

H. TEMPLETON BROWN,
STUART BERNSTEIN,
EDWARD R. LEV,
231 South LaSalle Street,
Chicago 4, Illinois.

JAMES FRANCIS REILLY,
1625 K Street, N. W.
Washington 6, D. C.
Attorneys for
United Air Lines, Inc.

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
231 South LaSalle Street,
Chicago 4, Illinois
Of Counsel.

[fol. 146]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,777

UNITED AIR LINES, INC., Appellant,

v.

NATIONAL MEDIATION BOARD, et al., Appellees.

No. 18,068

NATIONAL MEDIATION BOARD, et al., Appellants,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

No. 18,072

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Appellant,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[fol. 147] Mr. Stuart Bernstein, with whom Mr. James Francis Reilly was on the brief, for appellant in No. 17,777.

Mr. Milton Kramer, with whom Mr. James L. Highsaw, Jr., was on the brief, for appellant in No. 18,072.

Mr. Howard E. Shapiro, Attorney, Department of Justice, with whom Assistant Attorney General Douglas, Messrs. David S. Acheson, United States Attorney, and Morton Hollander, Attorney, Department of Justice, were on the brief, for appellees in No. 17,777 and for appellants in No. 18,068.

Mr. Alex L. Arguello, of the bar of the Supreme Court of California, pro hac vice, by special leave of court, with whom Mr. Jerome C. Muys was on the brief, for appellee in No. 18,068 and No. 18,072. Mr. David Booth Beers also entered an appearance for appellee in No. 18,068 and No. 18,072.

Mr. John E. Stephen filed a brief on behalf of Air Transport Association of America, as amicus curiae, urging reversal on No. 17,777.

Mr. William G. Mahoney filed a brief on behalf of Railway Labor Executives' Association, as amicus curiae, uring affirmance in No. 17,777.

OPINION—Decided March 12, 1964

Before WILBUR K. MILLER, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM: These three appeals have been consolidated by this court. In our view Nos. 18,068 and 18,072 should be disposed of first, although they are later in their numbering.

In No. 18,068, the National Mediation Board appeals from an order issued by the District Court which, among other things, restrains the Board from conducting a representation election.

[fol. 148] In No. 18,072, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes appeals from the same order.

The order appealed from is as follows:

"... ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the

form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is

"FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 et seq. gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

The opinion of Judge Youngdahl, of the District Court, is found in 218 F.Supp. 114 (1963) and is adopted by us as the opinion of this court. It follows that the judgment of the District Court in these cases must be affirmed.

In No. 17,777, United Air Lines, Inc. appeals from the dismissal by the District Court of its action filed to enjoin the election proposed by the National Mediation Board. The grounds for dismissal of the action are not stated in the court's order but, as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed. The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the Dis- [fol. 149] trict Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought.

No. 18,068 is affirmed.

No. 18,072 is affirmed.

No. 17,777 is affirmed.

WRIGHT, Circuit Judge, concurring in part and dissenting in part: In No. 17,777 of this consolidated litigation, United Air Lines appeals from the District Court's refusal to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth, of the Railway Labor Act. 48 Stat. 1188, 45 U.S.C. § 152, Ninth. In Nos. 18,068 and 18,072, the National Mediation Board and the Brotherhood of Railway and Steamship Clerks appeal from the granting of an injunction against the Board, by the same court through a different judge, restraining it from conducting the same election which is the subject of the United Air Lines suit. The second injunction action was brought[1] by certain employees of United Air Lines who claim to want to represent themselves *individually* in their labor negotiations with their employer. I agree with the court that in No. 17,777 the United Air Lines injunction proceeding was properly dismissed by the District Court. I respectfully dissent from its affirmance in Nos. 18,068 and 18,072 upholding the issuance of the injunction against the National Mediation Board.

Since the United Air Lines suit and the action brought by some of its employees appear to have a common inspiration as well as common issues, I shall treat them to- [fol. 150] gether. Both United and its appellee employees, here called ABNE,[2] urge two grounds for enjoining the Board from performing its duty under the Act: (1) The Board improperly determined the bargaining unit craft or class to be "clerical, office, stores, fleet and passenger service employees"; and (2) the Board proposes to use in the election a form of ballot which does not provide a space for the employee to vote against representation.

The craft or class recognized by the Board as the proper bargaining unit for the proposed election is the same as that recognized in its 1947 proceeding. Case No. R-1706, Determinations of Craft or Class of the National Mediation Board (1947). There has been no change in the classification since that time. After considering the

[1] The employees' action was brought after United Air Lines' application for an injunction was denied.

[2] Association for the Benefit of Non-Contract Employees.

representations by United as to the need for change, the Board determined that it would follow its prior ruling. Thus United and ABNE would have the court reweigh these class considerations and substitute its judgment for the Board's.

With reference to the form of ballot, space is provided to vote for either of the competing unions.[3] A third blank space is indicated for voting for a representative not named on the ballot. That same blank space may be used for voting for "no union" or "no representation." Section 2, Fourth,[4] of the Railway Labor Act provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Thus, if a majority of the craft or class actually votes for representation, a representative may be selected. [fol. 151] If a majority fails to vote, the Board may not certify a representative. *Radio Officers' Union* v. *National Mediation Board,* 86 U.S. App. D.C. 319, 181 F.2d 801 (1950). In addition, the admitted practice of the Board is to add the number voting "no union" to the number not voting in determining whether a majority of the employees eligible to vote actually voted for representation.

The District Court's action enjoining the Board from conducting the election here is in the teeth of a host of cases from the Supreme Court, from this court, and from the Circuit Courts around the country. In the interest of economy, I shall simply list *seriatim* the reasons why this injunction should not have been issued and briefly comment on each.

1. The District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943). In upholding the action of the Board

[3] The two competing unions shown on the ballot were the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists.

[4] 48 Stat. 1187, 45 U.S.C. § 152, Fourth.

against union attack, the Court in *Switchmen's Union* said, "* * * if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain." 320 U.S. at 303. (Emphasis added.) Unlike the National Labor Relations Act,[5] the Railway Labor Act has no provision for judicial review. *Switchmen's Union* was reinforced by three other cases[6] handed down by the Supreme Court [fol. 152] at the same term, and the force of these decisions has continued, unmodified by Congress, down to the present day.[7]

2. The ballot which the District Court has ordered changed before an election can be conducted has been used by the Board and its predecessor, the Railway Labor Board, since 1921 in over 3,400 elections. In the 43 years since 1921, Congress has not indicated the slightest

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[5] 49 Stat. 453; 29 U.S.C. § 159(d).

[6] *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); and *Brotherhood of Railway & Steamship Clerks, etc.* v. *United Transport Service Employees*, 320 U.S. 715 (1943) (*per curiam*).

[7] *Order of Railway Conductors* v. *National Mediation Bd.*, 79 U.S.App.D.C. 1, 141 F.2d 366, *cert. dismissed*, 323 U.S. 166 (1944); *Radio Officers' Union* v. *National Mediation Board, supra; Rutas Aereas Nacionales, S.A.* v. *Edwards*, 100 U.S.App.D.C. 366, 244 F.2d 784 (1957); *Decker* v. *Venezolana*, 103 U.S.App.D.C. 301, 258 F.2d 153 (1958); *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, 111 U.S.App.D.C. 126, 294 F.2d 910 (1961), *cert. denied*, 369 U.S. 810 (1962); *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, 111 U.S.App.D.C. 121, 294 F.2d 905 (1961), *cert. denied*, 368 U.S. 956 (1962); *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, 114 U.S.App.D.C. 229, 314 F.2d 234 (1962). Among decisions from other courts are *Brotherhood of Ry. & S. Clerks, etc.* v. *Virginian Ry. Co.*, 4 Cir., 125 F.2d 853 (1942); *Rose* v. *Brotherhood of Railway and Steamships Clks.*, 4 Cir., 181 F.2d 944, *cert. denied*, 340 U.S. 851 (1950); *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 2 Cir., 311 F.2d 745, *cert. denied*, 373 U.S. 924 (1963); *Ruby* v. *American Airlines, Inc.*, 2 Cir., 323 F.2d 248 (1963), *cert. pending.*

disapproval of the Board's election machinery—including its ballot. Moreover, no court, except the District Court here,[8] in the ABNE case but *not* in the United case, has found this ballot unlawful.[9] And this court has approved its use as a proper exercise of the Board's discretion within the intendment of the Act. *Decker* v. *Venezolana, supra* Note 7 (see briefs).[10]

[fol. 153] 3. The Board's craft or class determination is unreviewable. This court has so held in at least four cases, one at the last term of court. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7; *Radio Officers Union* v. *National Mediation Board, supra.* The Fourth Circuit, in *Rose* v. *Brotherhood of Railway and Steamship Clks., supra* Note 7, 181 F.2d at 946, summed it up well:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute

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[8] The ABNE and United Cases were heard by different District Court judges.

[9] But *cf. McNulty* v. *National Mediation Board,* N.D.N.Y., 18 F.Supp. 494 (1936).

[10] The *Decker* case involved the jurisdiction of the District Court to review the action of the Mediation Board. Paragraph 8 of the amended complaint there raised the same issue which is raised here:

> "[Due process was denied] in that the ballot used in the election had no space on it for a vote to the effect that the employee did not want anyone, defendant I.A.M. or anyone else, to represent him."

That issue was preserved on appeal, in paragraph 1b of the Questions Presented:

> "• • • the right to [due process] was denied by use of a ballot which gave no way to vote against representation by any bargaining agent."

Affirming the dismissal of the complaint, this court stated, "We hold that the prohibition of the Switchmen's case applies in the circumstances of this case." 103 U.S.App.D.C. at 302, 258 F.2d at 154.

was to vest in the Mediation Board exclusive jurisdiction over the *certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining.* And it is equally clear that the *exercise of discretion by the board with respect to such matters is not subject to review by the courts.* • • • " (Emphasis added.)

4. United Air Lines lacks standing to challenge the [fol. 154] Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, "to put an end to the harmful consequences of • • • individual dealing between large carriers and small employees. *Machinists* v. *Street*, 367 U.S. 740, 760; *Virginian Ry.* v. *Federation*, 300 U.S. 515, 553; *Texas & N.O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 570." United's obligation under the Act is *not "to interfere in any way with the organization of its employees."* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation designed to block or delay representation elections conducted by the National Mediation Board.

5. There is no *Leedom* v. *Kyne*, 358 U.S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom*. This principle has been expounded recently by this court in a series of cases so there should be no doubt about its application. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, *supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, *supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, *supra* Note 7. In the *UNA* case we said (111 U.S.App.D.C. at 124, 294 F.2d at 908):

"Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in Leedom v. Kyne, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210.

We cannot agree. In Leedom the Supreme Court carefully differentiated Switchmen's Union from the case before it, pointing out that the latter did not involve 'review' of agency action, but the striking down of action *in excess of delegated powers, in flat violation of the controlling statute*—there the Labor Man- [fol. 155] agement Relations Act, 29 U.S.C.A. § 141 et seq. See 358 U.S. at pages 188-190, 79 S.Ct. at pages 183-184. It should be noted, also, that in Leedom v. Kyne the National Labor Relations Board *did not deny* that it had contravened its governing statute. See 358 U.S. at page 187, 79 S.Ct. at page 183. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. • • • " (Emphasis added.)

6. There is a demonstrable lack of equity in the application for the injunction against holding the election. ABNE, the no-contract employees' group, claims it represents more than half of the employees eligible to vote in the election. If so, its remedy is to tell its members either not to vote or to vote for no representation. As shown, if its membership complies with these instructions, there will not be a majority voting for representation and, consequently, no representative will be certified. As indicated during oral argument, this was precisely the result of the voting—or not voting—in the representation election held recently at Lake Central Airlines. No irreparable injury is shown, therefore, if the election here is conducted as ordered by the Board.

This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. See, *e.g.*, *Adair* v. *United States*, 208 U.S. 161 (1908); *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923). I thought those days were over.

I regret my inability to agree with my distinguished brethren in respect to this litigation. Respectfully I dissent from the court's ruling upholding this injunction.

[fol. 156] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1963

Civil 402-63
No. 17,777
UNITED AIR LINES, INC., Appellant,
v.
NATIONAL MEDIATION BOARD, et al., Appellees.

Civil 973-63
No. 18,068
NATIONAL MEDIATION BOARD, et al., Appellants,
v.
ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

Civil 973-63
No. 18,072
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, Appellant,
v.
ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Bastian and Wright, Circuit Judges.

JUDGMENT—March 12, 1964

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court:

(1) that the judgment of the District Court on appeal in cases Nos. 18,068 and 18,072 is hereby affirmed; and

(2) that the judgment of the District Court on appeal in case No. 17,777 is also affirmed.

Per Curiam.

Dated: March 12, 1964.

Separate opinion by Circuit Judge Wright concurring in affirmance in case No. 17,777 and dissenting from affirmance in cases Nos. 18,068 and 18,072.

[fol. 157] Petition for Rehearing of Appellant United Air Lines, Inc. covering 10 pages filed March 27, 1964 omitted from this print. It was denied, and nothing more by order of April 14, 1964.

[fol. 167] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963

Civil-402-63

No. 17,777

UNITED AIR LINES, INC., Appellant,

v.

NATIONAL MEDIATION BOARD, et al.

Before: Wilbur K. Miller, Bastian and Wright, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—April 14, 1964

On consideration of appellant's petition for rehearing, it is

Ordered by the court that appellant's petition is hereby denied.

Per Curiam.

Dated: April 14, 1964

[fol. 170] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 171]

SUPREME COURT OF THE UNITED STATES

No. 139, October Term, 1964

UNITED AIR LINES, INC., Petitioner,

vs.

NATIONAL MEDIATION BOARD, et al.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 138 and 369 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 12, 1964.

OPINIONS BELOW

The opinion of the District Court is reported at 218 F. Supp. 114, and is appended hereto as Appendix A. The opinion of the Court of Appeals has not yet been officially reported; it is unofficially reported at 55 LRRM 2628, and is appended hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1963. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the District Court have jurisdiction to review the National Mediation Board's determination of the craft or class of employees of United Air Lines among whom a representation election should be held or the form of the ballot to be used in such election?

2. Does a group of employees of United Air Lines banded together in an association which expressly does not seek representation rights but seeks solely a change from the National Mediation Board in the composition of the craft or class and a change in the form of ballot, have standing to bring an action to enjoin the Board's determination of the craft or class or the form of ballot to be used in the election?

3. Does the Railway Labor Act impose on employees the duty, as well as confer the right, to bargain collectively?

4. Does the Railway Labor Act require the National Mediation Board, when it conducts an election to determine a collective bargaining representative, to use

a ballot containing a box to be marked for a vote against having a representative?

5. Is respondent barred by laches against complaining of the conduct of the National Mediation Board because it delayed for months after the Board was directed by the Act to have made a decision, before asking the Board to do anything?

STATUTES AND REGULATION INVOLVED

The relevant provisions of the Railway Labor Act (45 U.S.C. § 151 et seq.) are set forth in Appendix D. Section 1206.5 of the Rules of the National Mediation Board (29 CFR Ch. X) is set forth in Appendix E.

STATEMENT OF THE CASE

This litigation had its origin in an application filed by the petitioning Brotherhood with the National Mediation Board on August 24, 1962, requesting the Board to certify the Brotherhood as the collective bargaining representative under the Railway Labor Act of the following craft or class of employees of United Air Lines (JA* 35-36):

> "Commonly known as clerical, office, stores, (excluding stores employees represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employees represented as of August 24, 1962 by the International Association of Machinists) and passenger service employees".

The application was filed pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C.A. § 152,

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* References to "JA" are to the Joint Appendix in the Court of Appeals, of which a certified and nine additional copies are filed with this petition.

Ninth), quoted in Appendix D, p. 15a. That provision directs the Board to resolve a representation dispute within thirty days after its services are invoked.

On August 27, 1962, the Board acknowledged receipt of the application, noting that there was excluded from the normal craft the employees represented by the International Association of Machinists on the date the application was filed. JA 48. On August 30, 1962, the Board advised United and IAM of the Brotherhood application. JA 53.

On September 7, 1962, United advised the Board that in its opinion the application should be dismissed because it involved only a part of what the Board had found to constitute a craft or class in Case No. R-1706. JA 55. It requested that in the event the Board did not dismiss the application, it should hold a hearing to determine whether the proper craft or class is that expressed in prior determinations of the Board.

On September 11, 1962, IAM advised the Board that in its opinion the application did not conform to the findings of the Board in Case No. R-1706 with respect to craft or class.

Case No. R-1706, cited by both United and IAM, was a proceeding involving several airlines in which public hearings were held. In its decision on January 31, 1947, the Board, on the basis of extensive findings of fact with respect to airline operations and the duties of the several employees therein, determined that for purposes of representation under the Railway Labor Act certain employees should constitute a craft or class. These were described in detail under the captions "clerical and office employees including attend-

ants", "stores employees", "fleet service employees", and "passenger service employees".

On October 5, 1962, the Brotherhood amended its application to cover the entire craft or class described in Case No. R-1706 instead of excluding those positions theretofore represented by IAM. JA 59. The amended application was docketed by the Board on November 8, 1962 as Case No. R-3590.

The Board authorized an election after a mediator reported that his investigation showed a representation dispute to exist under the Board's rules. On December 19, 1962, the mediator requested United to furnish by January 14, 1963, a list of the employees involved in order to conduct the election. JA 37.

On January 11, 1963, United took the position that the request for the list was premature and requested a hearing on the proper scope of the craft or class involved in the Brotherhood's amended application. JA 61. On January 17, 1963, the Board denied the request for a hearing on the grounds that there was no misunderstanding or dispute concerning the scope of the class, that the carrier is not a party to a representation dispute, and that a request for a hearing at such late date was not timely. JA 70.

On January 18, 1963, United stated that it was willing to have a ballot box election on the company's premises provided the Board departed from its long-established practice and used a form of ballot that provided a space to vote for "no representative". JA 79. On January 24, 1963, the Board replied that it saw no reason to depart from its customary form of ballot in this dispute, stating that the form of ballot used by the Board had been in use since the Board's creation

and that such change would contribute to an attempt to avoid the mandate of Congress that representatives be designated. JA 80.

The form of ballot used by the Board provides a space to vote for any of the contending organizations and a blank to vote for any other organization whose name is to be written in. This form has been used for 30 years in more than 3,400 elections, in furtherance of the Board's understanding of the Congressional intent that there be representatives. JA 161-63.

On February 4, 1963, the Board's mediator asked United the status of its list of employees eligible to vote in the election and was advised it would be completed about February 11, 1963. JA 39. On that date the mediator repeated his inquiry, and United advised him and the Board that it refused to furnish the list. JA 39, 99. The Board directed the mediator to copy the necessary information from the carrier's records. JA 40.

On February 12, 1963, United commenced an action against the Board in the United States District Court for the District of Columbia, seeking to enjoin the Board from conducting an election without first holding a hearing and affording United an opportunity to appear as a party in interest on the question of the appropriate scope of the craft or class, and to enjoin the Board from using the form of ballot it had always used. The District Court granted the Board's motion to dismiss. United's appeal in that case was consolidated with the Board's and the Brotherhood's appeals in this case in the Court of Appeals, and the dismissal of its complaint was affirmed.

On February 14, 1963, the Association for the Benefit of Non-Contract Employees, respondent to this

petition, asked the Board for leave to intervene in the representation dispute; it requested also a redetermination of the craft or class and a change in the form of ballot to provide a space for an affirmative vote against representation. JA 43, 102. On February 25, 1963, it advised the Board that it did not seek recognition as collective bargaining representative, did not want its name on the ballot, and would be dissolved after it served its purpose. JA 111. The Board denied such petition. JA 14, 26, 44. A petition for reconsideration was denied April 12, 1963. JA 44, 45, 111.

The Board completed the formulation of the list of eligible voters and scheduled a mail election for April 22, 1963. JA 26, 47. On April 13, 1963, the day after the denial of its petition for reconsideration, the Association commenced an action in the United States District Court for the District of Columbia, asking for the same relief which United had asked in its action and also that the Board be required to grant the Association status as a party to the requested hearing. JA 4-9. On April 18, 1963, a temporary restraining order was issued (JA 2, 33), and on May 3, 1963 a preliminary injunction was issued enjoining the Board from conducting an election in which the form of ballot does not permit a vote to be cast against representation, ordering the Board to show cause in one week why the preliminary injunction should not be made permanent, and remanding the remainder of the relief prayed for to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act gives employees the right to have a ballot on which they can vote against representation. JA 132.

On May 10, 1963, the Mediation Board filed a motion to dismiss the complaint, or in the alternative for summary judgment. JA 159. At the same time the Board responded to the District Court's order of May 3, 1963, to show cause why the preliminary injunction should not be made permanent, opposing a permanent injunction and requesting that the preliminary injunction be vacated or stayed to permit the Mediation Board to conduct the proposed election. JA 158.

On May 8, 1963, the Brotherhood filed a petition to intervene as a defendant in the proceedings and tendered to the District Court an answer to the complaint on behalf of the Brotherhood. JA 3, 157. By order dated May 29, 1963, the District Court granted the Brotherhood's motion to intervene (JA 171) and on the same date entered its final judgment and order permanently enjoining the Mediation Board from conducting a representation election on the Brotherhood application unless the form of ballot used permits a voting employee to cast a vote against collective bargaining representation. This order also remanded to the Board for further consideration in the light of the Court's conclusions the request of the respondent Association that the Board conduct a hearing relating to the appropriateness of the craft or class of employees of United among whom the election should be held, at which hearing the Association could be heard as a party. JA 170.

On appeal to the Court of Appeals for the District of Columbia, that judgment was affirmed, Judge Wright dissenting. Appendix C.

Respondent predicated the District Court's jurisdiction on 28 U.S.C. §§ 1331 and 1337. It was and is

the position of petitioner that the District Court was without jurisdiction of the subject-matter by reason of such jurisdiction having been withheld by the Railway Labor Act.

REASONS FOR GRANTING THE WRIT

Most of the reasons for granting the writ are set forth in the dissenting opinion below of Judge Wright, in which he concluded (App. 15a):

> "This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. * * * I thought those days were over."

The decision below, especially on the issue of its jurisdiction of the subject-matter, is in conflict with decisions of this Court and numerous decisions of other Courts of Appeals and District Courts. On the issue of the form of ballot, the decision below upsets a practice since the Board's inception, thirty years ago, which it followed in over 3,400 elections, casts doubt on the validity of innumerable certifications of collective bargaining representatives under the Railway Labor Act, and has given rise to other litigation of the same nature disrupting the functioning of the National Mediation Board in the resolution of representation disputes; it decides an important question under the Railway Labor Act which has not heretofore been considered by this Court. Such decision should not be permitted to stand without review by this Court.

I. The District Court Did Not Have Jurisdiction of the Subject-Matter

In this case the National Mediation Board took two actions which were the basis of the complaint in the District Court. First, the Mediation Board exercised its discretion to refuse the request of the respondent Association that the Board conduct a hearing for the purpose of redetermining the scope of the craft or class of employees of United Air Lines among whom a representation election should be held on the application of the Brotherhood. Second, the Mediation Board exercised its discretion to refuse the request of the Association that the Board change the form of ballot used by the Board for almost thirty years in the conduct of representation elections on railroads and airlines under the Railway Labor Act.

Following this Court's decision in *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297 (1943), numerous decisions have followed its holding and held that the federal courts were without jurisdiction to review decisions the Board makes in resolving representation disputes. A number of them are cited in footnote 7 of Judge Wright's dissenting opinion. App. 11a. After the decision of the District Court in this case, the United States District Court for the Northern District of Ohio expressly disagreed with it and held directly opposite. *Droggos* v. *National Med. Bd.,* 227 F. Supp. 61.

Unlike the National Labor Relations Act, the Railway Labor Act contains no provision for judicial review of representation proceedings. In the *Switchmen's Union* case this Court held that such absence indicated a Congressional purpose that there be no such review. The decisions below are the first attempt

since then by the courts to direct the Mediation Board concerning the procedure it must follow in resolving representation disputes,—a procedure contrary to its uniform practice during its entire existence. Already it has stirred up a number of similar disputes and some lawsuits around the country and has made it impossible for the Board to perform its functions in this area in many cases in the manner it deems proper. The decision below should be reviewed, else the functioning of section 2, Ninth of the Railway Labor Act will continue to be frustrated in numerous cases.

II. Respondent Had No Standing to Maintain the Action

Although the respondent Association petitioned the Board (six months after the Brotherhood invoked the Board's services) for leave to intervene, to redetermine the craft or class, and to change the form of ballot the Board had always used (JA 102-5), it stated expressly that it did not want to be the bargaining agent and did not want its name on the ballot. JA 111. Under the Board's long-standing rules, intervention is permitted if there is warrant for placing the intervenor's name on the ballot. Rule 1206.5 (29 CFR Ch. X). The Board's authority under section 2, Ninth relates solely to "who are the representatives", and respondent has precluded itself from being a party to any such dispute and thus has no standing to seek judicial review of the manner in which the Board resolves that dispute.

The decision below in effect sweeps aside these long-standing rules of the Board which have, so far as we know, never before been challenged.

III. If the Merits are Reached, it is Important That This Court Settle the Question of Whether the Railway Labor Act Requires That the Ballot Provide for a Vote Against Representation

The Court below held that the Railway Labor Act requires that there shall be on the ballot the National Mediation Board uses in elections a place to vote affirmatively for having no collective bargaining representative (JA 147-56), and permanently enjoined an election in this case unless the ballot so provided. JA 170.

This Court recognized, in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 560 (1937) that the Railway Labor Act "is dependent for its operation upon the selection of representatives." The Board has always been of the view that the Act intends employees to have representatives and has consistently, in more than 3,400 elections over a period of thirty years, used ballots to determine who is, not whether there shall be, the representative of the craft or class, although it makes no certification if less than a majority cast valid ballots. Nor has it kept this view a secret, yet Congress has not seen fit to amend the Act.

Petitioner submits that that view is the correct one, as evidenced by numerous provisions of the Act.

Section 2, Second of the Act provides that disputes shall be considered "in conference between representatives". Section 6 provides that a change in rates of pay, rules, or working conditions shall be initiated by the carriers or "representatives of employees" serving a thirty day notice, and that conferences must be had "between the representatives of the parties". Section 2, Sixth provides that in the case of a dispute over grievances "it shall be the duty of the designated rep-

resentative or representatives of such carrier or carriers and of such employees" to confer. Section 2, Fourth provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representatives", not whether there shall be representatives. Section 2, Ninth provides that in a representation dispute the Board shall make a decision (with or without an election) "as to who are the representatives", not whether there shall be representatives. Thus unlike the National Labor Relations Act (29 U.S.C. § 159(e)), the Railway Labor Act contains no provision for decertification of a collective bargaining representative without certification of another. The United States District Court for the Northern District of Ohio expressly disagreed with the decision below on the validity of the form of ballot used by the Board. *Droggos* v. *National Mediation Board,* 227 F. Supp. 61.

But regardless of whether the Court below or other courts are correct concerning the soundness of these views, it is important that this Court settle that question.

Since the decision of the District Court in this case the question of the validity of the form of ballot has been frequently raised, and on a number of occasions litigation over that issue has ensued. In two of those cases orders have been entered deferring further proceedings until the final determination of this case. *World Airways, Inc.* v. *Natl. Med. Bd., et al.,* D. C. N.D. Calif., S.D., C.A. No. 42045; *United States* v. *World Airways, Inc.,* D. C. N.D. Calif., S. D., C.A. No. 42136.

In the Twenty-ninth Annual Report of the National Mediation Board to the Congress, transmitted Novem-

ber 1, 1963, the Board referred to some of this litigation (p. 19) and reported that it had not changed the form of its ballot and believed it should not do so until the litigation was concluded. In the meantime, the issue keeps getting raised, litigation ensues, and in some cases the functions of the Board in this area cannot be performed. The issue should be settled by this Court.

IV. Even if the Courts Below had Jurisdiction, and Even if Respondent had Standing to Sue, and Even if the Position of the Board and Petitioner on the Merits is Wrong, Respondent is Barred by Laches From the Relief Sought

Section 2, Ninth of the Railway Labor Act imposes upon the National Mediation Board the duty to certify the name of the representative within thirty days after the receipt of the invocation of its services with respect to a dispute as to who is the representative. The invocation in this case was made by the Brotherhood on August 24, 1962, and its receipt by the Board was acknowledged on August 27, 1962. JA 48. It has been recognized for some time that the Board cannot always make a determination within the thirty-day period specified in the statute and that the language of Section 2, Ninth in this respect is hortatory rather than an inflexible command. But the goal is thirty days, and the performance should meet the goal or approach it to the extent feasible.

Respondent's request to be heard by the Board was not made until February 11, 1963, five and a half months after the Brotherhood's invocation and four and a half months after the Board was supposed to have made its certification. This was after the Board had denied an identical request from United (JA 86) and after the Board had decided to proceed with an

election. JA 98. It was also some three weeks after the Board had denied United's request for a redetermination of the craft or class upon the ground in part that such request was untimely. JA 71.

Under such circumstances, the request coming at such time was too late. Assuming that respondent had standing to make the request and to initiate this litigation, the respondent should not be heard by the courts to complain of conduct of the Board when it did not even approach the Board until four and a half months after the Board was supposed to have concluded its procedures and when the Board had already ruled on the issues involved. JA 70, 76, 86, 96. Yet, as a result of its request and this ensuing litigation, more than a year and a half have now passed since the Board's services were invoked and no certification has yet been made.

To permit such belated application and to entertain litigation predicated on its rejection, in the absence of a showing of the most extraordinary circumstances, would make a mockery of the statutory thirty-day requirement and of orderly procedure, and would facilitate an evasion of obligations imposed by Congress in the Railway Labor Act.

CONCLUSION

To put an end to multifarious litigation over issues that had universally been recognized as nonjusticiable from the time of this Court's decision in *Switchmen's Union* v. *National Mediation Board*, 300 U.S. 515, until the decision below in this case, and to bring to an end the innumerable administrative disputes and the frustration of the Board's functions in numerous cases under section 2, Ninth of the Railway Labor Act, cer-

tiorari should be granted to reaffirm this Court's holding in the *Switchmen's Union case*. If the Court should conclude that certiorari should not be granted for such reason, then it should be granted for any of the other reasons urged above, especially to settle the question whether the form of ballot used by the Board for thirty years in over 3,400 elections, is in violation of the Railway Labor Act.

Respectfully submitted,

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APPENDIX A

Memorandum

On May 3, 1963, this Court granted a preliminary injunction enjoining the defendant National Mediation Board from conducting any election among the "Clerical, Office, Stores, Fleet and Passenger Service employees" of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation. On the same date, this Court also ordered that the defendant have until May 10, 1963, to show why the preliminary injunction above granted should not be made permanent.

On May 10, 1963, the defendant filed a motion to dismiss the complant, or in the alternative for summary judgment. On the same date, the defendant filed a response to the order to show cause, requesting the Court to reconsider and vacate the preliminary injunction above granted, or to stay the preliminary injunction and allow the Mediation Board to conduct the proposed election, and opposing the entry of a permanent injunction.

In support of its various motions, the defendant has submitted an affidavit of Francis A. O'Neill, Jr., a member of the National Mediation Board. Mr. O'Neill has repeated the Board's position as to the long-continued use of this form of ballot, and the time and expense involved in the preparation by the Board of a new list of eligible voters. Obviously, neither of these arguments is sufficient to overcome the Court's previous conclusions, stated in its memorandum of May 3, 1963, that the proposed form of ballot is illegal under the Railway Labor Act, 45 U.S.C. § 151 *et seq*, and that plaintiffs, with the balance of convenience in their favor, would be irreparably injured by the holding of the election with an illegal form of ballot.

The only argument of Mr. O'Neill's not already made by the Board, and hence not fully considered by the Court in reaching its conclusion to issue the preliminary injunction, is the following:

> In the opinion of the National Mediation Board any requirement that the ballot used in a representation dispute be changed to provide a space in which the voters can vote for no represenation will tend to encourage the parties to a representation dispute to resort to self-help rather than to seek the services of the Board in resolving the representation dispute and will result in strikes and unrest in the industries covered by the Railway Labor Act which would not result were the normal form of ballot used.

Implicit in this argument is the assumption that unions will prefer to strike rather than to ask the National Mediation Board to investigate a representation dispute pursuant to 45 U.S.C. § 152, Ninth, if any election held by the Board in the course of such investigation must be by a ballot on which the voter can express a preference for no collective bargaining representation. Why unions would prefer to strike rather than engage in an election campaign culminating in a ballot on which all alternatives are clearly stated is not clear to the Court. The Board already has a policy of refusing to certify a collective bargaining representative if a majority of the eligible voters fail to return valid ballots. The Court has merely held that the ascertainment of the number of voters who prefer no collective bargaining representation must, under the Railway Labor Act, be by means of ballots on which such preference can be expressed clearly and unambiguously. Such an unambiguous procedure for ascertaining majority will is no more an invitation to strikes or "self-help" than is the Board's own present policy. In any event, if such "self-help" were to impair the Board's important functions, then it would be for the Congress to take such action as it demed appropriate to change the Railway Labor Act.

The Board has made the further argument that the issue of whether the Railway Labor Act's provisions for majority determination of representation disputes requires a

ballot on which a voter can express a preference against any such representation, is a matter properly left to the expertise of the Board, even though a question of statutory construction is obviously involved. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), upon which the Board relies for this argument, is not in point. There the dispute concerned which of two methods of financial cost accounting was required by a statute which specified neither, and the Supreme Court held that the Canal Company could determine the issue as it thought best, particularly since the President and the Congress had been fully advised of the Canal Company's method of accounting. 356 U.S. at 318-19. "[T]he question is so wide open and at large as to be left at this stage to agency discretion. The matter should be far less cloudy, much more clear for courts to intrude." *Id.* at 319. Here, by contrast with the *Panama Canal Co.* case, the issue of statutory construction goes to the very center of the complicated mediation procedures outlined at length in the Railway Labor Act, with its clear and uncloudy emphasis upon majority determination of the issue of representation. The form of ballot prescribed by the Board is a clear "mistake of law," and judicial review is thus appropriate. *Id.* at 318.

The Board has also cited to the Court certain language from the recent case of *WES Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, — U.S. App. D.C. —, 314 F.2d 234 (1962).[1] The language immediately following that

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[1] "The need for a large degree of conclusiveness in the settlement of labor disputes over the question of employee representation in the transportation industry was met by Congress in the Railway Labor Act. Responsibility was given to a board with special competence, in the effort to maintain enough harmony to prevent interruption of service. Congress sought to preclude litigation in the courts over what the Supreme Court has called an 'explosive problem.' *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 303 (1943). The Court said Congress had taken 'great pains' to protect the Mediation Board in its handling of the problem. Consequently the courts have seldom intruded. [Citation of cases omitted.]" 314 F.2d at 236.

quoted by the Board, however, is more relevant to the issues now before the Court:

> Where courts have taken jurisdiction of such representation disputes the context has strongly indicated either that the Board by refusing to act had obliterated rights granted to employees by Congress or, turning now to a situation arising under the National Labor Relations Act, the Board had acted in excess of its delegated powers and contrary to a statutory provision which is "clear and mandatory." *Leedom* v. *Kyne*, 358 U.S. 184 (1958). When this occurs the courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. *WES Chapter, supra*, 314 F.2d at 236.

An election based upon use of the Board's present ballot would obliterate the right to vote for no collective bargaining representation, and would thus be contrary to the clear requirements of the Railway Labor Act's stated policy of majority determination.

Since the above points constitute the only issues raised by the Board in response to the Court's order to show cause why the preliminary injunction should not be made permanent, and since the Board in response to said order to show cause has raised no disputed issue of fact on which a trial would be necessary, the Court will deny the Board's motion to dismiss or in the alternative for summary judgment, and will issue a permanent injunction for the reasons set forth in this memorandum and in the memorandum of May 3, 1963.[2]

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[2] In reaching this conclusion, the positions advanced by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, which union has been permitted to intervene in this action pursuant to Rule 24(b), Fed. R. Civ. P., have been fully considered but have not been separately stated since they repeat, in summary form, issues fully argued by the Board and disposed of by the Court in its memorandum of May 3, 1963.

This memorandum shall be considered as specific findings of fact and conclusings of law, supplemental to the findings of fact, conclusions of law, and memorandum of May 3, 1963, which findings, conclusions, and memorandum of May 3, 1963 are hereby readopted by the Court.

/s/ LUTHER W. YOUNGDAHL
Judge

May 29, 1963

APPENDIX B

Order Amending District Court Opinion

Counsel for the National Mediation Board having informed the Court that the policy of the Board concerning ballots marked "No representation" or "No union" is to tabulate such ballots as void, and to treat such ballot as if the voter had refrained from returning a ballot at all, it appears to the Court that the following sentences, appearing on page 10 of the Court's memorandum filed May 3, 1963, should be deleted therefrom:

> If, instead of refraining to vote, the voter returns a ballot marked "No representation" or "No union," the ballot will be counted for purposes of participation, but will be tabulated as void; the voter would thus cast a ballot against the very position he seeks to support.

Therefore, it is by the Court this 10th day of May, 1963,

ORDERED That the above sentence be and the same is hereby deleted from said memorandum.

/s/ LUTHER W. YOUNGDAHL
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,777

UNITED AIR LINES, INC., *Appellant*

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*

No. 18,068

NATIONAL MEDIATION BOARD, ET AL., *Appellants*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Appellee*

No. 18,072

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Appellant*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Appellee*

Appeals from the United States District Court for the District of Columbia

---

Before WILBUR K. MILLER, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM: These three appeals have been consolidated by this court. In our view Nos. 18,068 and 18,072 should be disposed of first, although they are later in their numbering.

In No. 18,068, the National Mediation Board appeals from an order issued by the Disrtict Court which, among other things, restrains the Board from conducting a representation election.

In No. 18,072, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes appeals from the same order.

The order appealed from is as follows:

> ". . . ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 et seq gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

The opinion of Judge Youngdahl, of the District Court, is found in 218 F.Supp. 114 (1963) and is adopted by us as the opinion of this court. It follows that the judg-

ment of the District Court in these cases must be affirmed.

In No. 17,777, United Air Lines, Inc. appeals from the dismissal by the District Court of its action filed to enjoin the election proposed by the National Mediation Board. The grounds for dismissal of the action are not stated in the court's order but, as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed. The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the District Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought.

No. 18,068 is affirmed.

No. 18,072 is affirmed.

No. 17,777 is affirmed.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*: In No. 17,777 of this consolidated litigation, United Air Lines appeals from the District Court's refusal to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth, of the Railway Labor Act. 48 Stat. 1188, 45 U.S.C. § 152, Ninth. In Nos. 18,068 and 18,072, the National Mediation Board and the Brotherhood of Railway and Steamship Clerks appeal from the granting of an injunction against the Board, by the same court through a different judge, restraining it from conducting the same election which is the subject of the United Air Lines suit. The second injunction action was brought[1] by certain employees of

[1] The employees' action was brought after United Air Lines' application for an injunction was denied.

United Air Lines who claim to want to represent themselves *individually* in their labor negotiations with their employer. I agree with the court that in No. 17,777 the United Air Lines injunction proceeding was properly dismissed by the District Court. I respectfully dissent from its affirmance in Nos. 18,068 and 18,072 upholding the issuance of the injunction against the National Mediation Board.

Since the United Air Lines suit and the action brought by some of its employees appear to have a common inspiration as well as common issues, I shall treat them together. Both United and its appellee employees, here called ABNE,[2] urge two grounds for enjoining the Board from performing its duty under the Act: (1) The Board improperly determined the bargaining unit craft or class to be "clerical, office, stores, fleet and passenger service employees"; and (2) the Board proposes to use in the election a form of ballot which does not provide a space for the employee to vote against representation.

The craft or class recognized by the Board as the proper bargaining unit for the proposed election is the same as that recognized in its 1947 proceeding. Case No. R-1706, Determinations of Craft or Class of the National Mediation Board (1947). There has been no change in the classification since that time. After considering the representations by United as to the need for change, the Board determined that it would follow its prior ruling. Thus United and ABNE would have the court reweigh these class considerations and substitute its judgment for the Board's

With reference to the form of ballot, space is provided to vote for either of the competing unions.[3] A third blank

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[2] Association for the Benefit of Non-Contract Employees.

[3] The two competing unions shown on the ballot were the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists.

space is indicated for voting for a representative not named on the ballot. That same blank space may be used for voting for "no union" or "no representation." Section 2, Fourth,[4] of the Railway Labor Act provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Thus, if a majority of the craft or class actually votes for representation, a representative may be selected. If a majority fails to vote, the Board may not certify a representative. *Radio Officers' Union* v. *National Mediation Board*, 86 U.S.App.D.C. 319, 181 F.2d 801 (1950). In addition, the admitted practice of the Board is to add the number voting "no union" to the number not voting in determining whether a majority of the employees eligible to vote actually voted for representation.

The District Court's action enjoining the Board from conducting the election here is in the teeth of a host of cases from the Supreme Court, from this court, and from the Circuit Courts around the country. In the interest of economy, I shall simply list *seriatim* the reasons why this injunction should not have been issued and briefly comment on each.

1. The District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). In upholding the action of the Board against union attack, the Court in *Switchmen's Union* said, "* * * if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain." 320 U.S. at 303. (Emphasis added.) Unlike the National Labor

[4] 48 Stat. 1187, 45 U.S.C. § 152, Fourth.

Relations Act,[5] the Railway Labor Act has no provision for judicial review. *Switchmen's Union* was reinforced by three other cases[6] handed down by the Supreme Court at the same term, and the force of these decisions has continued, unmodified by Congress, down to the present day.[7]

2. The ballot which the District Court has ordered changed before an election can be conducted has been used by the Board and its predecessor, the Railway Labor Board, since 1921 in over 3,400 elections. In the 43 years since 1921, Congress has not indicated the slightest disapproval of the Board's election machinery—including its ballot. Moreover, no court, except the District Court

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[5] 49 Stat. 453, 29 U.S.C. § 159(d).

[6] *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); and *Brotherhood of Railway & Steamship Clerks, etc.* v. *United Transport Service Employees*, 320 U.S. 715 (1943) (*per curiam*).

[7] *Order of Railway Conductors* v. *National Mediation Bd.*, 79 U.S. App. D.C. 1, 141 F. 2d 366, *cert. dismissed*, 323 U.S. 166 (1944); *Radio Officers' Union* v. *National Mediation Board, supra; Rutas Aereas Nacionales, S.A.* v. *Edwards*, 100 U.S. App. D.C. 366, 244 F. 2d 784 (1957); *Decker* v. *Venezolana*, 103 U.S. App. D.C. 301, 258 F. 2d 153 (1958); *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, 111 U.S. App. D.C. 126, 294 F. 2d 910 (1961), *cert. denied*, 369 U.S. 810 (1962); *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, 111 U.S. App. D.C. 121, 294 F. 2d 905 (1961), *cert. denied*, 368 U.S. 956 (1962); *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, 114 U.S. App. D.C. 229, 314 F. 2d 234 (1962). Among decisions from other courts are *Brotherhood of Ry. & S. Clerks. etc.* v. *Virginian Ry. Co.*, 4 Cir., 125 F. 2d 853 (1942); *Rose* v. *Brotherhood of Railway and Steamships Clks.*, 4 Cir., 181 F. 2d 944, *cert. denied*, 340 U.S. 851 (1950); *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 2 Cir., 311 F. 2d 745, *cert. denied*, 373 U.S. 924 (1963); *Ruby* v. *American Airlines, Inc.*, 2 Cir., 323 F. 2d 248 (1963), *cert. denied*, February 17, 1964.

here, in the ABNE case but *not* in the United case, has found this ballot unlawful.[8] And this court has approved its use as a proper exercise of the Board's discretion within the intendment of the Act. *Decker* v. *Venezolana, supra* Note 7 (see briefs).[9]

3. The Board's craft or class determination is unreviewable. This court has so held in at least four cases, one at the last term of court. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7; *Radio Officers' Union* v. *National Mediation Board, supra.* The Fourth Circuit, in *Rose* v. *Brotherhood of Railway and Steamship Clks., supra* Note 7, 181 F.2d at 946, summed it up well:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute

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[8] But *cf. McNulty* v. *National Mediation Board,* N.D.N.Y., 18 F. Supp. 494 (1936).

[9] The *Decker* case involved the jurisdiction of the District Court to review the action of the Mediation Board. Paragraph 8 of the amended complaint there raised the same issue which is raised here:

> "[Due process was denied] in that the ballot used in the election had no space on it for a vote to the effect that the employee did not want anyone, defendant I.A.M. or anyone else, to represent him."

That issue was preserved on appeal, in paragraph 1b of the Questions Presented:

> "* * * the right to [due process] was denied by use of a ballot which gave no way to vote against representation by any bargaining agent."

Affirming the dismissal of the complaint, this court stated, "We hold that the prohibition of the Switchmen's case applies in the circumstances of this case." 103 U.S. App. D.C. at 302, 258 F. 2d at 154.

was to vest in the Mediation Board exclusive jurisdiction over the *certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining.* And it is equally clear that the *exercise of discretion by the board with respect to such matters is not subject to review by the courts.* * * *" (Emphasis added.)

4. United Air Lines lacks standing to challenge the Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, "to put an end to the harmful consequences of * * * individual dealing between large carriers and small employees. *Machinists* v. *Street*, 367 U.S. 740, 760; *Virginian Ry.* v. *Federation*, 300 U.S. 515, 553; *Texas & N.O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 570." United's obligation under the Act is *not "to interfere in any way with the organization of its employees."* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation designed to block or delay representation elections conducted by the National Mediation Board.

5. There is no *Leedom* v. *Kyne*, 358 U.S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom*. This principle has been expounded recently by this court in a series of cases so there should be no doubt about its application. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra*

Note 7. In the *UNA* case we said (111 U.S.App.D.C. at 124, 294 F.2d at 908):

> "Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in Leedom v. Kyne, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210. We cannot agree. In Leedom the Supreme Court carefully differentiated Switchmen's Union from the case before it, pointing out that the latter did not involve 'review' of agency action, but the striking down of action *in excess of delegated powers, in flat violation of the controlling statute*—there the Labor Management Relations Act, 29 U.S.C.A. § 141 et seq. See 358 U.S. at pages 188-190, 79 S.Ct. at pages 183-184. It should be noted, also, that in Leedom v. Kyne the National Labor Relations Board *did not deny* that it had contravened its governing statute. See 358 U.S. at page 187, 79 S.Ct. at page 183. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. • • •" (Emphasis added.)

6. There is a demonstrable lack of equity in the application for the injunction against holding the election. ABNE, the no-contract employees' group, claims it represents more than half of the employees eligible to vote in the election. If so, its remedy is to tell its members either not to vote or to vote for no representation. As shown, if its membership complies with these instructions, there will not be a majority voting for representation and, consequently, no representative will be certified. As indicated during oral argument, this was precisely the result of the voting—or not voting—in the representation election held recently at Lake Central Airlines. No irreparable injury is shown, therefore, if the election here is conducted as ordered by the Board.

This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. See, *e.g.*, *Adair* v. *United States*, 208 U.S. 161 (1908); *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923). I thought those days were over.

I regret my inability to agree with my distinguished brethren in respect to this litigation. Respectfully I dissent from the court's ruling upholding this injunction.

APPENDIX D

Railway Labor Act (29 U.S.C. §§ 151 et seq.). § 2. Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and estab-

lish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

APPENDIX E

Section 1206.5 of Rules of National Mediation Board:

"*Necessary evidence of intervenor's interest in a representation dispute.* In any representation dispute under the provisions of section 2, Ninth, of the Railway Labor Act, an intervening individual or organization must produce proved authorizations from at least thirty-five (35) percent of the craft or class of employees involved to warrant placing the name of the intervenor on the ballot."

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IN THE

Supreme Court of the United States

(October Term, 1953)

No. 537

UNITED AIR LINES, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. .....

UNITED AIR LINES, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner United Air Lines, Inc. ("United"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on March 12, 1964 in Case No. 17,777, *United Air Lines, Inc.* v. *National Mediation Board, et al.* (Appendix A, *infra*), affirming the order of the district court dismissing United's complaint and granting summary judgment to respondents (Appendix C, *infra*).

OPINIONS BELOW.

The opinion of the Court of Appeals, printed as Appendix B to this petition, is not yet reported. The order of the District Court, printed as Appendix C to this petition, is not reported. There was no written opinion by the District Court.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered on March 12, 1964 (Appendix A, *infra*). Petition for rehearing was denied on April 14, 1964 (R. 167). Jurisdiction is conferred on this Court by 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED.

1. The National Mediation Board refused to hold a hearing at the request of United on the question of the appropriate craft or class of employees among whom an election was to be held to determine a representative for bargaining under the Railway Labor Act. The stated reasons for the refusal were that the Board did not consider United to be a party in interest on the question and that the labor organizations involved had agreed on the unit. The Board took no evidence on the craft or class question, and accepted the agreement of the labor organizations without independent inquiry. The questions presented are:

   a. Does a carrier have a constitutional due process right to be heard by the Mediation Board on the craft or class issue?

   b. May the Board make a craft or class determination arbitrarily by accepting the division of employees agreed upon by interested labor organizations without consideration of any other relevant criteria?

   c. Does a carrier have judicial standing to raise the foregoing questions?

2. The form of ballot used in a representation election by the Mediation Board does not permit an eligible employee to cast a valid ballot for no representation. The questions presented are:

a. Does this form of ballot violate the mandate of the Railway Labor Act that the majority of employees in the craft or class have the right to select the representative for the craft or class?

b. Does a carrier have judicial standing to complain of the ballot form?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved are the Fifth Amendment to the United States Constitution and Sections 2 Fourth and Ninth of the Railway Labor Act, 48 Stat. 1187-88, 45 U. S. C. § 152. These provisions are printed as Appendix D to this petition.

STATEMENT.

In this case the Court of Appeals affirmed an order of the district court granting defendants' motion for summary judgment. The facts as they appear from the uncontradicted affidavits and the documents atttached thereto are as follows:

The Scope of the Bargaining Unit.

United is an air carrier subject to the Railway Labor Act. It employs approximately 32,000 persons. Of these, approximately 4,500 are office and clerical employees such as typists, stenographers, file clerks, electronic computer and office machine operators, receptionists and telephone operators; approximately 5,100 are public contact employees, such as reservation and ticket sales agents, vacation booking agents, passenger agents, station agents and other employees whose duties are performed primarily with and before the public; and approximately 3,100 are ramp and stores employees, who, among other duties, load, stow, unload, pick-up and deliver cargo, baggage and food, on. to and from aircraft at ramps and terminals; clean aircraft in connection with through service, maintain the ramp area and equipment; perform storeroom work, including the receiving, checking, inspecting, shipping, issuing, inventorying and storing of materials, supplies and equipment (JA 15-16, 106-08).*

The office, clerical and public contact personnel at United have never organized for collective bargaining purposes. However, the ramp and stores employees have been organized as a separate group for over 20 years, and since

* References are to the printed Joint Appendix in the Court of Appeals.

1948 have been represented by the International Association of Machinists ("IAM") (JA 16). On Capital Airlines, however, which in 1961 was merged with United, all three groups of employees had been represented by the Brotherhood of Railway Clerks ("BRC") (JA 103).

Although in 1947, with respect to four airlines, including Capital but not United (No. R-1706, 1 NMB Determinations 423), the National Mediation Board found that all of these groups of employees should be joined in one craft, as they were on the railroads, subject to re-examination on any particular airline when necessary to further the purposes of the Act, the Board found in 1953 that "because of the expansion and growth of the airline industry • • • as well as the development of representation of airline employees" it would upon proper application "re-examine the determination in Case R-1706." Case No. R-2357, 2 NMB Determinations 66, 67 (1953). In 1956 the Board made such a re-examination and found that on only six out of 30 carriers was the R-1706 classification being followed. Case Nos. C-2252, C-2389, 3 NMB Determinations 16 (1956). In the cases last cited, the Board refused to follow the R-1706 classification, and separated the stock clerks from the other groups of employees. In December, 1963, the Board again refused to follow its 1947 determination in a case involving Eastern Air Lines. There the Board directed a separate election among stock clerks at Eastern over the contention of the IAM (a participant in the case) that stock clerks are part of the R-1706 classification (Case R-3639, December 5, 1963).

On August 24, 1962, after United's merger with Capital, the BRC invoked the services of the Board to investigate a representation dispute among United's "clerical, office, stores, fleet [ramp] and passenger [public contact] service" employees, excluding, however, those ramp and stores employees hired by United prior to August 24, 1962 (JA

31). The BRC was willing to leave the excluded employees to the IAM, which had represented them as a separate group since 1948. The BRC application was docketed as NMB Case No. R-3590.

The IAM objected to the BRC application. As a result the BRC amended the application to cover all (a) clerical, (b) public contact, and (c) ramp and stores employees, including those represented by the IAM whether hired after August 24, 1962 or before (JA 43, 47). The IAM did not object to this bargaining unit, and the Board, without further factual inquiry, acquiesced in the unit to which the two unions had agreed, although it was also apparently willing to proceed with an election among only the groups not previously represented by the IAM if the two unions would have agreed to that (JA 135, 138, 142). The bargaining unit thus created would have lumped together United's most highly skilled technical white collar employees and its least skilled common labor employees, including janitors. United's skilled blue collar workers—its mechanics —are members of a separate craft or class.

When the BRC first invoked the Board's services, the Board also asked United to submit any statement it cared to make. In reply, United noted the BRC's improper exclusion of employees on the basis of date of hiring and asked the Board to dismiss the application. United added that if the Board should not dismiss the application, it "should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board" (JA 39).

On January 11, 1963, after the BRC amended its application, United again asked the Board to hold a hearing on the craft or class question. United called attention to the fact that on most airlines the R-4706 classification of

all of these groups as a single bargaining unit was inappropriate and had not been followed either by the carriers or by the Board (JA 55). The Board denied this request and a subsequent request for consideration, noting that the "two organizations which are parties to the dispute are in agreement . . ." (JA 71). The reasons assigned by the Board for its denial were:

> ". . . that the Carrier is not a party to this matter, and also . . . that neither of the organizations who are parties to this case [IAM and BRC] have made any request for a hearing on the question of craft or class. The Board, therefore, denied the request of United for such a hearing." (JA 99).

The Form of the Ballot.

Concurrently with the correspondence relating to the matter of a hearing on the craft or class question, United requested the Board to alter its customary form of ballot to permit an employee to vote for "no union." United's request was based on legislative history, which it cited to the Board, showing that Congress intended employees subject to the Railway Labor Act to be free to vote for or against representation, and also on the analogy of the practice under the National Labor Relations Act which embodies the same statutory scheme (JA 73).

The form of ballot which the Board has used in the past and which it had planned to use in the United election does not contain space for a "no representation" vote as does the ballot used by the National Labor Relations Board (JA 101). The Mediation Board's practice is to provide space to vote only *for* the labor organization or organizations seeking representation rights, and an additional blank for "any other organization or individual" (JA 81).

A Mediation Board election is valid only if a majority of the eligible voters cast valid ballots. A majority of the

valid ballots cast is sufficient to elect a representative. A ballot is valid only if cast *for* a representative. A ballot upon which is written "no representative" or which is cast blank by the voter is voided (JA 7). There is no way for an employee opposed to representation by any union effectively to indicate his wishes.* The Board's form of ballot makes it possible for a minimum of 25% plus one of the employees to elect a bargaining representative for the entire craft or class, despite the desire of a majority of employees either to remain unrepresented or at least not to be represented by the labor organization so elected (JA 7-8).

The Board declined to change its form of ballot, stating that "introduction of a 'yes' or 'no' ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees. . . ." (JA 86).

On February 7, 1963, the Board wrote to United: "The Board will proceed with an election among the employees concerned in NMB Case No. R-3590 under the Board's usual policies and procedures in such cases." (JA 98).

Proceedings in the Courts Below.

United filed its complaint four days later, alleging in the first count, that it had been deprived of its rights under the statute and the due process clause by the Board's arbitrary and capricious acceptance of whatever craft or class was agreed upon by the labor organizations involved, and by the Board's refusal to hold a hearing addressed to the craft or class issue in which United as a party could

* He can refuse to vote at all, but the Board refuses to tell the employees that if they oppose representation by a union, they should express their position by staying away. Employees would otherwise, in ignorance, believe that they ought to vote in order to express their wishes.

produce evidence demonstrating the inappropriateness of the Board's craft or class determination (JA 4). The second count alleged that the form of ballot which the Board insisted on using was inconsistent with the employer's statutory duty to treat with the representative chosen by the majority of a craft or class of its employees, and invaded its right not to be required to bargain for a craft or class with a representative not favored by the majority (JA 6).

The complaint alleged that the composition of a craft or class of employees for collective bargaining purposes affected valuable property rights of an employer in the conduct of its business, and that the combining of the 12,700 employees performing work in many different and unrelated classifications, such as electronic computer operators, ticket agents, and cleaning women, into a single craft or class would have a substantial and adverse impact on the operations and cost of conducting United's business (JA 5).

The complaint sought to restrain the Board from holding the election unless the form of ballot was corrected and United was given a hearing as to the proper scope of the bargaining unit. The complaint did not seek judicial review of any substantive determination as to the scope of the unit, but only to compel the Board to make the determination in accordance with the requirements of the statute and of due process. Federal jurisdiction was based on 28 U. S. C. §§ 1331 and 1337.

Following the filing of the complaint, United moved for a preliminary injunction (JA 11), and the Board moved to dismiss the complaint or for summary judgment on the grounds that United lacked standing to maintain the action; that the complaint failed to state a justiciable controversy and that United was not entitled to injunctive relief because the action was premature, irreparable injury was not demonstrated and the action of the Board

was not erroneous (JA 110). Affidavits were filed by both parties in support of their respective motions (JA 14, 103, 106, 111, 135, 142).

The District Court (per Judge Matthews) granted the Board's motion for summary judgment, and dismissed the complaint in a brief order which did not state any reason for the court's action and which found only that "there is no genuine issue of material fact." (JA 144; Appendix C, *infra*).

Shortly after the dismissal of United's complaint, a group of United employees filed a complaint in the District Court against the Mediation Board which attacked the form of ballot and the Board's refusal to grant the employees a hearing on the craft or class question. The BRC intervened in support of the position of the Mediation Board. Judge Youngdahl issued a permanent injunction restraining the Board from conducting an election with a form of ballot which does not permit a voting employee to cast a vote against representation, and remanded to the Board for further consideration the employees' request for hearing on the question of the appropriateness of the craft or class. *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, 218 F. Supp. 114 (Dist. Col., 1963).

United appealed from the dismissal of its complaint in this action, and the Mediation Board and BRC appealed from the judgment entered by Judge Youngdahl. The three appeals were consolidated in the Court of Appeals. In a *per curiam* opinion, that Court affirmed the decision of Judge Youngdahl in the employees' suit, and also affirmed the dismissal of United's complaint in this case (Appendix B, *infra*).

The Court of Appeals noted that the grounds for dismissal of United's complaint were not stated in the dis-

trict court's order, but stated that "as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed." The Court then stated:

> ". . . The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the District Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought." (*infra*, p. v-vi.)

United petitioned for rehearing, pointing out that although the action of the Court of Appeals in affirming Judge Youngdahl's order may have resolved the ballot question it left completely unanswered the issues relating to United's right to be heard on the craft or class question and the Board's duty in making such a determination. The petition requested the Court, therefore, to decide the "close question" of United's standing (R. 157). This petition was denied on April 14, 1964 (R. 167).

United has been advised that the BRC intends to petition for a writ of certiorari to review the affirmance of Judge Youngdahl's order; since that order may be subject to further review, this petition raises the question of United's standing with respect to the ballot issue as well as its standing to complain of the Mediation Board's method of determining the appropriate craft or class.*

*We have not been advised whether the National Mediation Board will petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT.

This case presents two questions of importance in the administration of the Railway Labor Act.

The first relates to the interest of an employer in the procedure by which the National Mediation Board determines craft or class—or bargaining unit—questions. United's position is that it is a violation of its right to procedural due process and in derogation of the Board's statutory duty for the Board to make this determination arbitrarily and without fair hearing. There is no reason why an employer whose labor relations are regulated by the Railway Labor Act should be in any different position in this respect than an employer under the National Labor Relations Act. Yet the Mediation Board's contention is that an employer has no interest in the bargaining unit and hence has no right to complain if the Board refuses to hear it, while the National Labor Relations Board has always accorded the employer the right to be heard. This case challenges the fairness of the procedure of the National Mediation Board. Since *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), forecloses review on the merits of Mediation Board determinations, it is imperative that the Board be required to hear all interested parties and to exercise its statutory duty fairly and rationally if due process is to be observed. The presence of a fair hearing procedure by the National Labor Relations Board, and the opportunity for ultimate judicial review on the merits, distinguishes *Boire* v. *The Greyhound Corp.*, 84 S. Ct. 894 (1964).

The second question relates to the form of ballot used

by the Mediation Board in representation elections. This question is presented here conditionally because of the affirmance by the Court of Appeals in the consolidated appeal below of Judge Youngdahl's order restraining the Board from conducting an election unless the ballot permitted an eligible employee to cast a valid vote for no representation. If certiorari to review that judgment is denied, the question as to the ballot becomes academic insofar as this case is concerned. If the BRC petition is granted, however, United respectfully requests that this petition be granted as to both questions presented so that it may be heard on the ballot question as well as the craft or class issue.

It was because of its affirmance of Judge Youngdahl's injunction order that the Court of Appeals concluded not to decide the "close question" of United's judicial standing, finding that its decision in the companion cases "affords the relief concerning the form of ballot which United sought." Appendix B, *infra*, pp. v-vi. But this conclusion was clearly a *non sequitur* since it ignored United's interest in the bargaining unit question, which was independent of the form of ballot.

I. THE EMPLOYER'S RIGHT TO BE HEARD.

A. United Has an Interest in the Scope of the Bargaining Unit.

The economic interest of an employer in the composition or structure of a collective bargaining unit of its employees —never doubted under the National Labor Relations Act, which applies to all interstate industry except rail and air carriers—entitles it to be heard administratively on the effect of a proposed unit and to suggest alternative units.

The complaint here alleged that the composition of a craft or class of employees for collective bargaining pur-

poses affects valuable property rights of United in the conduct of its business, and that the combining into one craft or class 12,700 of United's employees in such unrelated classifications as electronic computer operators, ticket agents and cleaning women will have a substantial and adverse impact on the operations and cost of conducting United's business (JA 5). United's affidavits detailed how such a craft or class is inconsistent with United's organizational structure, and the effect such a craft or class would have on the business of United, its efficiency and its ability properly to perform its public service function (JA 16-17, 24-26, 106-109).

The purpose of a bargaining unit determination is to provide a rational basis of grouping employees for bargaining purposes. In the Mediation Board's words, it is intended that the craft or class will reflect "the functions, duties and responsibilities of the employees" and the "community of interest existing between jobs" (JA 28). The scope of the unit inevitably has impact upon the manner in which an employer organizes his work force. Issues such as seniority, transfers, job posting and bidding rights tend to be common to the entire craft or class. If the craft or class truly represents a community of interest, the result is mutually advantageous. If not, the disruptive effect on the employer's business may have serious economic consequence.

This appears from the affidavit of C. P. Hutchens, who was the Director of Personnel for Capital Airlines prior to its merger into United. That affidavit described the serious impact on Capital resulting from a single collective bargaining agreement for the "clerical" craft or class made up of so many and diverse job classifications, including the cost of employee retraining and impairment of employee morale and efficiency as the result of trans-

fers from and into classifications having no functional similarity (JA 103-5).

Aside from its impact on the conduct of United's business, this craft or class determination has obvious impact on United's right to freedom of contract. Here, for example, the craft or class determination poses the substantial probability that United will no longer be able to bargain separately with its ramp and stores employees—part of the craft or class established here—as it has with the IAM voluntarily since 1948. For once a representative for the craft or class is selected, United will be under an obligation to bargain with that representative for that craft or class, and with no other representative for any of the employees in that craft or class. *Virginian Railway Co.* v. *System Federation,* 300 U. S. 515, 548 (1937).

B. United Has Judicial Standing to Assert a Denial of Due Process.

United's right to carry on its business free of the restraint of an arbitrarily determined craft or class and its right to contract freely with its employees in other bargaining units unless these rights are limited in accordance with the procedural requirements of due process, gives it standing to complain judicially of the Mediation Board's procedure.

The potential effect on United of the scope of the bargaining unit is analogous to the effect of the Federal Communications Commission regulations reviewed in *Columbia Broadcasting System* v. *United States,* 316 U. S. 407 (1942). There CBS complained that the FCC regulations relating to the withdrawal of licenses of radio stations whose contracts with networks contained certain proscribed provisions impaired its ability to conduct its business, would make its operations more costly, reduce its earnings

and render its property and business less valuable. In reversing the dismissal of the complaint for lack of jurisdiction, the Court stated, *inter alia:*

> "Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." at 422.

The interest of United here is certainly no less substantial than was that of the association in *National Motor Freight Traffic Ass'n* v. *United States*, 372 U. S. 246 (1963), where the Court held that the association had judicial standing to complain of an I. C. C. freight regulation which did not affect it but only its member carriers.

An employer's right to procedural due process in determinations affecting its labor relations have always been recognized by this Court, and its judicial standing to complain of alleged violations of this right have been assumed without question. Constitutional attacks on legislation in this area have been entertained and disposed of in this Court not on the ground that the employer had no constitutional right to complain but because the legislative restriction in issue was held not to be an unreasonable restraint on the employer's right to carry on its business. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570 (1930); *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 541, 553 (1937); *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 43-44 (1937).

In *Pittsburgh Plate Glass Co. v. NLRB*, 313 U. S. 146, 154-55 (1941), the employer attacked a bargaining unit determination of the National Labor Relations Board on the ground, among others, that the NLRB procedure denied due process of law. The contention was disposed of on the ground that the procedure was fair, not that the employer had no standing to be heard.

Recently the Court of Appeals for the Tenth Circuit held that an employer under the National Labor Relations Act was entitled to a due process hearing on the issue of the appropriateness of the bargaining unit determined in a representation proceeding. The case was remanded to the NLRB for redetermination in light of evidence proffered by the employer but rejected by the Board. *NLRB v. Ideal Laundry & Dry Cleaning Co.*, 56 LRRM 2036 (C. A. 10, No. 7381, April 23, 1964).

The employer under the Railway Labor Act has the same interest, since under each statute he is required to bargain with the representative chosen by the majority of the designated unit.

C. The Switchmen's Union Case Does Not Prevent the Courts from Requiring the Mediation Board to Provide a Fair Procedure.

In support of its position that United lacks judicial standing to complain of Board procedures, the Mediation Board places primary reliance on *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943), which held that craft or class determinations were not subject to judicial review.

Since United does not seek review of the merits of the Board's determination but only that the Board be required to make that determination on the basis of evidence and in accordance with the requirements of the statute and of

procedural due process, the reliance on *Switchmen's* is misplaced.

In any event, *Switchmen's* did not foreclose review of constitutional questions, nor did it insulate the Board from judicial inquiry as to whether it was exercising the duty imposed on it by the Railway Labor Act.

Switchmen's was initiated by a labor union which protested a determination made after hearing by the Board that a craft or class had to be system-wide and include all employees of the carrier in the classification. The Court noted that there was no provision for review of craft or class determinations under the Railway Labor Act, and reasoned that since Congress had created the "right" of majority representation, "*all constitutional questions aside*, it is for Congress to determine how the rights which it creates shall be enforced." 320 U. S. at 301. (Emphasis added.)

But the "rights" which Congress created established correlative limitations on the prior rights of carriers; hence the Railway Labor Act imposed the duty on employers to "treat with" or bargain with the "true representative" of the craft or class. This duty is enforceable by injunction. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937).*

Thus the origin of the right asserted by the labor union in *Switchmen's* is not the same as that asserted by United

* An air carrier's obligations under the Railway Labor Act are also enforceable through proceedings before the Civil Aeronautics Board under Section 401(k)(4) of the Federal Aviation Act of 1958 (49 U. S. C. § 1301, *et seq.*). This section provides that compliance with the Railway Labor Act is a condition of the carrier's holding its certificate of public convenience and necessity. In such a proceeding before the C.A.B. the carrier would be foreclosed from raising any questions as to the propriety of the designation of a bargaining representative by the Mediation Board. See *Southern Pilots Ass'n* v. *Civil Aeronautics Board*, 323 F. 2d 288, 290 (C. A. D. C., 1963), cert. den. 84 S. Ct. 966 (1964).

here. United's right was not created by Congress, but rather was limited by Congress. Hence even if this case sought judicial review of the merits of the Board's craft or class determination it would not be barred by *Switchmen's*. This case raises the constitutional question expressly reserved.

As a preliminary step to its holding that Board craft or class determinations are not reviewable, the Court held in *Switchmen's* that Congress had imposed on the Board the duty to make such determinations. That the Court did not intend to foreclose all judicial examination of the exercise of this duty is apparent from a footnote comment in *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 336 n.12 (1943), decided the same day:

> "Whether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth and, if so, the type or types of situations in which it may be invoked present questions not involved here."

The instant case involves the Board's obligation under the Constitution and the statute to utilize fair procedure in making the craft or class determination. *Switchmen's* is no bar to review of the Board's failure to exercise this duty.

D. The Board Was in Error in Denying United Administrative Standing and in Accepting Whatever Bargaining Unit the Unions Agreed Upon.

This petition raises the question not only of United's judicial standing to complain that the Board procedures denied it procedural due process but the merits of the Board's position that United lacks administrative standing as a party in interest on craft or class determinations. The Court of Appeals' failure to decide the "close ques-

tion" of United's judicial standing has the effect of deciding adversely to United, without any judicial inquiry, the ultimate question of the Board's duty and United's rights before the Board.

The Board's position on the ultimate question is that United as an employer may not be a party to a representation dispute under Section 2 Ninth of the Railway Labor Act. The implicit assumption is that if labor organizations which the Board recognizes as parties in interest are in agreement on the bargaining unit, then the Board has no obligation to exercise its own discretion or to hear from the objecting employer.

The Board fails to differentiate between the determination of the scope of the bargaining unit and the selection of the representative once the unit is determined. The former is the Board's business, as an administrative agency. Persons having an economic interest in the matter have a right to be heard. The selection of the representative for the designated unit is the business of a majority of the employees, from which the employer is properly excluded. But his exclusion from this part of the process does not warrant excluding him from the determination of the scope of the bargaining unit, in which he has a substantial interest.

The distinction was clearly drawn by the District of Columbia Court of Appeals in *UNA Chapter, Flight Engineers International Association* v. *National Mediation Board*, 294 F. 2d 905, 908 (1961), cert. den. 368 U. S. 956 (1962), where the Court stated:

> "Under the Railway Labor Act only the NMB (or the committee designated by it) has the power to make craft or class determinations . . . The right given to employees is that of designating, by a majority of those comprising a 'craft or class,' their representatives."

The Mediation Board's view of its power and duty to make craft or class determinations on the basis of relevant evidence was clearly stated to this Court in the Board's brief in opposition to the Flight Engineers Association petition for a writ of certiorari in the *UNA Chapter* case:

> "On the merits, petitioner's objections are equally unavailing. In essence it claims that once a craft or class is recognized it may not change. Petitioner relies on the fact that it represented the flight engineers in past bargaining with the carrier. However, *Congress has charged the Board* (or its Committee) *with a duty to find the craft or class to be whatever it is, not what it used to be.* Where employees—such as pilots and flight engineers in this age of jets—change in function, duties, interests, skills and responsibilities as a result of technological development in the industry, *the Board must recognize the change.* Notwithstanding petitioner's assertions, the Board neither destroyed nor created a craft or class. Pursuant to the directive of Section 2 Ninth, of the Railway Labor Act, it made a finding that there is today an existing craft or class of flight deck crew members." (Brief in Opposition of National Mediation Board, Supreme Court No. 531, October Term, 1961, pp. 13-14. Emphasis added.)

Nothing in the Railway Labor Act or in the Board's statement to this Court of its duty under the Act justifies the failure of the Board to make a rational determination of the craft or class here solely because two competing labor organizations agreed on how to split up United's employees. It may well have been that if the Board had heard United's evidence concerning the impact of electronic computers on reservations systems, record keeping and billing and the resulting "change in functions, duties, interests, skills and responsibilities" of its employees, it might have found another craft or class appropriate despite the agreement of the IAM and BRC. As the Board has elsewhere acknowledged, ". . . In the Board's investi-

gation of such matters under Section 2, Ninth, of the Act, it must rely on the carrier for information needed in considering the dispute." *Eastern Air Lines*, NMB Case No. R-3639, December 5, 1963.

The Board suggested below that its determination here was not arbitrarily made, but simply manifested adherence to its 1947 determination in R-1706. Even if that were true, decision on such a ground would fly in the face of the Board's statement to this Court in the *UNA Chapter* case that Congress charged it "with a duty to find the craft or class to be whatever it is, not what it used to be." We have shown at p. 5, *supra*, that the Board has not blindly followed R-1706 in other cases in which evidence was taken. Indeed, the unit lines approved in that case are recognized on only one-fifth of the air carriers.

Moreover, affidavits in this proceeding demonstrate that the Board was prepared to accept a different craft or class if the two labor organizations had agreed to a different unit. The record includes a letter from the IAM to the BRC, sent after the latter amended its application to include employees then represented by the IAM, in which letter the IAM commented on the possibility of the craft or class being again amended to exclude the IAM-represented employees. This letter states:

> "After discussing this matter further with the National Mediation Board, we were assured that if an agreement could be reached between your Organization and our Organization, which would exclude all employees in the craft or class presently represented by our Organization, the Board would conduct an election among the remaining employees in the craft or class without establishing a precedent that could be used by any other organization on any other property." (JA 139).

The complaint alleged that the determination was arbitrarily and capriciously made without any hearing and

without consideration of its effect on United. The record clearly supports the conclusion that the Board simply accepted the grouping agreed upon by the two unions and made no independent inquiry or determination.

This Court has elsewhere commented upon administrative determinations arbitrarily and capriciously made:

> "The Executive Order contains no express or implied attempt to confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so . . . An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 136 (1951).

II. THE BALLOT QUESTION.

Section 2 Ninth of the Railway Labor Act establishing election procedures for determining bargaining representatives was added by the 1934 amendments to the Act. 48 Stat. 1188. The constitutionality of this section was attacked in *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937), by an employer who contended that the provision denied it due process since it imposed an obligation on the employer to negotiate with a labor organization authorized to represent its employees and restrained it from making agreements with any other labor organization (at 541). The Court held that the statute imposed the affirmative duty to treat only with the "true representative" and the negative duty to treat with no other. The Court concluded that the "limited duties" imposed "cannot be said to be so arbitrary or unreasonable as to infringe due process." (at 548-49, 558-59.)

The employer in *Virginian* also challenged the certifi-

cation of a particular representative on the basis of its having received a majority of the votes cast, not a majority of those eligible to participate. The Court held that this procedure was not inconsistent with Section 2 Fourth of the Act which gives to the majority of the employees in a craft or class the right to determine the bargaining representative. The Court held that the non-voter is "presumed to assent to the expressed will of the majority of those voting" and added that otherwise "an indifferent minority could prevent the resolution of a contest." 300 U. S. at 560.

The Board's ballot, by not permitting an eligible employee to cast a valid ballot for no representative, enlarges the "limited duty" imposed by the Act and does not insure that the certified representative will be or can reasonably be presumed to be the "true representative" of the majority of the employees. For since the Board will consider an election to be valid if a majority of the eligible voters participate, and will certify on the basis of a majority of those participating, then 25% plus one vote will be sufficient to select the representative. The rationale of *Virginian* was that the non-voter is presumed to assent to the will of the majority of those voting. But if the non-voter has no way of expressing his desire to be unrepresented except by not voting, then the presumption falls. It can hardly be presumed that he assents to the choice of those voting, if his very reason for not voting is that he desires none of the available choices.

The Board justifies this illogical result on the ground that there is a Congressional mandate that employees designate representatives and that a ballot which permitted employees to vote for no representation would circumvent this mandate (JA 86). Thus the Board converts the "right" given employees under Section 2 Fourth of the

Railway Labor Act to select a bargaining representative into a "duty" to do so.

This result is completely contrary to the practice of the National Labor Relations Board operating under statutory provisions completely analogous in this respect to those of the Railway Labor Act. Cf. Sections 2 Fourth and Ninth of the Railway Labor Act and Sections 7 and 9(a) of the Wagner Act (Appendix D, *infra*, pp. xiv-xvi). See *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 44 (1937), holding Section 9(a) of the Wagner Act to be the analogue of Section 2 Ninth of the Railway Labor Act, and *Associated Press* v. *NLRB*, 301 U. S. 103, 130 (1937), to the same effect. The National Labor Relations Board has always permitted an employee to cast a valid ballot for no representation. *Interlake Iron Corporation*, 4 NLRB 55 (1937); JA 101.

That the National Labor Relations Board practice, rather than that of the National Mediation Board, conforms to Congressional intent is clear from the legislative history of Section 2 Ninth of the Railway Labor Act. The 1934 amendments to that Act were drafted by Joseph B. Eastman, and his views on the amendments have been accepted as authoritative by this Court. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 302 (1943). Commissioner Eastman testified before Congress that the bill—

> "does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." (Hearings on H. R. 7650, House Comm. on Interstate and Foreign Commerce, 73rd Cong. 2d Sess. 1934, p. 57.)

Senator Wagner, in response to a criticism of an industry witness that the amendments would have the effect of compelling employees to join unions, stated:

"I didn't understand these provisions compelled an

employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not join any union or to remain unorganized." (Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73rd Cong. 2d Sess. 1934, p. 76.)

There are additional examples in committee reports and hearings to the same effect. None supports the Board's position that it was the intent of Congress that an employee be required to select a representative. See H. Report 1944, House Comm. on Interstate and Foreign Commerce, 73rd Cong. 2d Sess. 1934, p. 2; Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73rd Cong. 2d Sess. 1934, p. 12.

Since the Board's ballot does affect and enlarge upon obligations imposed on United as a carrier under the Railway Labor Act, United has judicial standing to complain that the Board's ballot is inconsistent with the requirements of the Act. Hence if the Court should grant certiorari to review the affirmance of Judge Youngdahl's order restraining the use of an improper ballot by the Board, United's petition respecting this point should also be granted so that it may have an opportunity to present its views to the Court.

CONCLUSION

It was not United's position below, and it is not its position here, that this Court or any court should decide the appropriate craft or class, or that United is not subject to regulation in this area. United does not deny the authority of the Mediation Board to make craft or class determinations. United's position is simply that it has the right to be heard by the Board and have its position given serious consideration.

The Board has complained below that this litigation has delayed the resolution of a representation dispute, and has frustrated the Congressional intent as expressed in *Switchmen's* that once the Board exercised its duty to determine the craft or class, "There was to be no dragging out of the controversy into other tribunals of law." 320 U. S. 297 at 305. Prompt resolution of this dispute is as important to United as it is to the interested labor organizations, its employees or the public. But promptness is no excuse for arbitrary action, or for failure by the Board to exercise the duty imposed on it by the Railway Labor Act, or for the flouting of United's right to be heard. The important questions as to whether the Board's procedure was arbitrary, unfair and unlawful and whether an aggrieved carrier has any remedy against such procedure should be determined by this Court, so that hereafter representation disputes may be settled fairly as well as promptly.

United respectfully requests that for the foregoing reasons this petition be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

September Term, 1963.

No. 17,777 United Air Lines, Inc., *Appellant,* *vs.* National Mediation Board, et al., *Appellees.*	Civil 402-63
No. 18,068 National Mediation Board, et al., *Appellants,* *vs.* Association for the Benefit of Non-Contract Employees, *Appellee.*	Civil 973-63
No. 18,072 Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, *Appellant,* *vs.* Association for the Benefit of Non-Contract Employees, *Appellee.*	Civil 973-63

Appeals from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, BASTIAN and WRIGHT, *Circuit Judges.*

JUDGMENT.

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that the judgment of the District Court on appeal in cases Nos. 18,068 and 18,072 is hereby affirmed; and

(2) that the judgment of the District Court on appeal in case No. 17,777 is also affirmed.

Per Curiam.

Dated: March 12, 1964.

Separate opinion by Circuit Judge Wright concurring in affirmance in case No. 17,777 and dissenting from affirmance in cases Nos. 18,068 and 18,072.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

No. 17,777

United Air Lines, Inc., *Appellant*

vs.

National Mediation Board, *et al.*, *Appellees*

No. 18,068

National Mediation Board, *et al.*, *Appellants*

vs.

Association for the Benefit of Non-Contract Employees, *Appellee*

No. 18,072

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, *Appellant*

vs.

Association for the Benefit of Non-Contract Employees, *Appellee*

Appeals from the United States District Court for the District of Columbia

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Decided March 12, 1964

Mr. Stuart Bernstein, with whom *Mr. James Francis Reilly* was on the brief, for appellant in No. 17,777.

Mr. Milton Kramer, with whom *Mr. James L. Highsaw, Jr.*, was on the brief, for appellant in No. 18,072.

Mr. Howard E. Shapiro, Attorney, Department of Justice, with whom *Assistant Attorney General Douglas*, *Messrs. David C. Acheson*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on the brief, for appellees in No. 17,777 and for appellants in No. 18,068.

Mr. Alex L. Arguello, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Mr. Jerome C. Muys* was on the brief, for appellee in No. 18,068 and No. 18,072. *Mr. David Booth Beers* also entered an appearance for appellee in No. 18,068 and No. 18,072.

Mr. John E. Stephen filed a brief on behalf of Air Transport Association of America, as *amicus curiae*, urging reversal in No. 17,777.

Mr. William G. Mahoney filed a brief on behalf of Railway Labor Executives' Association, as *amicus curiae*, urging affirmance in No. 17,777.

Before WILBUR K. MILLER, BASTIAN and WRIGHT, Circuit Judges.

PER CURIAM: These three appeals have been consolidated by this court. In our view Nos. 18,068 and 18,072 should be disposed of first, although they are later in their numbering.

In No. 18,068, the National Mediation Board appeals from an order issued by the District Court which, among other things, restrains the Board from conducting a representation election.

In No. 18,072, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes appeals from the same order.

The order appealed from is as follows:

> ". . . ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U. S. C. § 151 et seq gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

The opinion of Judge Youngdahl, of the District Court, is found in 218 F. Supp. 114 (1963) and is adopted by us as the opinion of this court. It follows that the judgment of the District Court in these cases must be affirmed.

In No. 17,777, United Air Lines, Inc. appeals from the dismissal by the District Court of its action filed to enjoin the election proposed by the National Mediation Board. The grounds for dismissal of the action are not stated in the court's order but, as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed. The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the Dis-

trict Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought.

No. 18,068 is affirmed.
No. 18,072 is affirmed.
No. 17,777 is affirmed.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*: In No. 17,777 of this consolidated litigation, United Air Lines appeals from the District Court's refusal to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth, of the Railway Labor Act. 48 Stat., 1188, 45 U. S. C. § 152, Ninth. In Nos. 18,068 and 18,072, the National Mediation Board and the Brotherhood of Railway and Steamship Clerks appeal from the granting of an injunction against the Board, by the same court through a different judge, restraining it from conducting the same election which is the subject of the United Air Lines suit. The second injunction action was brought[1] by certain employees of United Air Lines who claim to want to represent themselves *individually* in their labor negotiations with their employer. I agree with the court that in No. 17,777 the United Air Lines injunction proceeding was properly dismissed by the District Court. I respectfully dissent from its affirmance in Nos. 18,068 and 18,072 upholding the issuance of the injunction against the National Mediation Board.

Since the United Air Lines suit and the action brought by some of its employees appear to have a common inspiration as well as common issues, I shall treat them together. Both United and its appellee employees, here called ABNE,[2] urge two grounds for enjoining the Board

1. The employees' action was brought after United Air Lines' application for an injunction was denied.

2. Association for the Benefit of Non-Contract Employees.

from performing its duty under the Act: (1) The Board improperly determined the bargaining unit craft or class to be "clerical, office, stores, fleet and passenger service employees"; and (2) the Board proposes to use in the election a form of ballot which does not provide a space for the employee to vote against representation.

The craft or class recognized by the Board as the proper bargaining unit for the proposed election is the same as that recognized in its 1947 proceeding. Case No. R-1706, Determinations of Craft or Class of the National Mediation Board (1947). There has been no change in the classification since that time. After considering the representations by United as to the need for change, the Board determined that it would follow its prior ruling. Thus United and ABNE would have the court reweigh these class considerations and substitute its judgment for the Board's.

With reference to the form of ballot, space is provided to vote for either of the competing unions.[3] A third blank space is indicated for voting for a representative not named on the ballot. That same blank space may be used for voting for "no union" or "no representation." Section 2, Fourth,[4] of the Railway Labor Act provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Thus, if a majority of the craft or class actually votes for representation, a representative may be selected. If a majority fails to vote, the Board may not certify a representative. *Radio Officers' Union* v. *National Mediation Board*, 86 U. S. App. D. C. 319, 181 F. 2d 801 (1950). In addition, the admitted practice of the Board is to add the

3. The two competing unions shown on the ballot were the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists.

4. 48 Stat. 1187, 45 U. S. C. §152, Fourth.

number voting "no union" to the number not voting in determining whether a majority of the employees eligible to vote actually voted for representation.

The District Court's action enjoining the Board from conducting the election here is in the teeth of a host of cases from the Supreme Court, from this court, and from the Circuit Courts around the country. In the interest of economy, I shall simply list *seriatim* the reasons why this injunction should not have been issued and briefly comment on each.

1. The District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943). In upholding the action of the Board against union attack, the Court in *Switchmen's Union* said, "* * * if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain." 320 U. S. at 303. (Emphasis added.) Unlike the National Labor Relations Act,[5] the Railway Labor Act has no provision for judicial review. *Switchmen's Union* was reinforced by three other cases[6] handed down by the Supreme Court at the same term, and the force of these decisions has continued, unmodified by Congress, down to the present day.[7]

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5. 49 Stat. 453, 29 U. S. C. § 159(d).

6. *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U. S. 338 (1943); and *Brotherhood of Railway & Steamship Clerks, etc.* v. *United Transport Service Employees*, 320 U. S. 715 (1943) (*per curiam*).

7. *Order of Railway Conductors* v. *National Mediation Bd.*, 79 U. S. App. D. C. 1, 141 F. 2d 366, *cert. dismissed*, 323 U. S. 166 (1944); *Radio Officers' Union* v. *National Mediation Board*, *supra*; *Rutas Aereas Nacionales, S. A.* v. *Edwards*, 100 U. S. App. D. C. 366, 244 F. 2d 784 (1957); *Decker* v. *Venezolana*, 103 U. S. App.

2. The ballot which the District Court has ordered changed before an election can be conducted has been used by the Board and its predecessor, the Railway Labor Board, since 1921 in over 3,400 elections. In the 43 years since 1921, Congress has not indicated the slightest disapproval of the Board's election machinery—including its ballot. Moreover, no court, except the District Court here, in the *ABNE* case but *not* in the *United* case, has found this ballot unlawful.[8] And this court has approved its use as a proper exercise of the Board's discretion within the intendment of the Act. *Decker* v. *Venezolana, supra* Note 7 (see briefs).[9]

D. C. 301, 258 F. 2d 153 (1958); *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, 111 U. S. App. D. C. 126, 294 F. 2d 910 (1961), *cert. denied*, 369 U. S. 810 (1962); *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, 111 U. S. App. D. C. 121, 294 F. 2d 905 (1961), *cert. denied*, 368 U. S. 956 (1962); *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, 114 U. S. App. D. C. 229, 314 F. 2d 234 (1962). Among decisions from other courts are *Brotherhood of Ry. & S. Clerks, etc.* v. *Virginian Ry. Co.*, 4 Cir., 125 F. 2d 853 (1942); *Rose* v. *Brotherhood of Railway and Steamship Clks.*, 4 Cir., 181 F. 2d 944, *cert. denied*, 340 U. S. 851 (1950); *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 2 Cir., 311 F. 2d 745, *cert. denied*, 373 U. S. 924 (1963); *Ruby* v. *American Airlines, Inc.*, 2 Cir., 323 F. 2d 248 (1963), *cert. pending*.

8. But *cf. McNulty* v. *National Mediation Board*, N. D. N. Y., 18 F. Supp. 494 (1936).

9. The *Decker* case involved the jurisdiction of the District Court to review the action of the Mediation Board. Paragraph 8 of the amended complaint there raised the same issue which is raised here:

> "[Due process was denied] in that the ballot used in the election had no space on it for a vote to the effect that the employee did not want anyone, defendant I. A. M. or anyone else, to represent him."

That issue was preserved on appeal, in paragraph 1b of the Questions Presented:

> "• • • the right to [due process] was denied by use of a ballot which gave no way to vote against representation by any bargaining agent."

Affirming the dismissal of the complaint, this court stated, "We hold that the prohibition of the Switchmen's case applies in the circumstances of this case." 103 U. S. App. D. C. at 302, 258 F. 2d at 154.

3. The Board's craft or class determination is unreviewable. This court has so held in at least four cases, one at the last term of court. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7; *Radio Officers' Union* v. *National Mediation Board, supra.* The Fourth Circuit, in *Rose* v. *Brotherhood of Railway and Steamship Clks., supra* Note 7, 181 F. 2d at 946, summed it up well:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute was to vest in the Mediation Board exclusive jurisdiction over the *certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining.* And it is equally clear that the *exercise of discretion by the board with respect to such matters is not subject to review by the courts.* * * *" (Emphasis added.)

4. United Air Lines lacks standing to challenge the Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, "to put an end to the harmful consequences of * * * individual dealing between large carriers and small employees. *Machinists* v. *Street,* 367 U. S. 740, 760; *Virginian Ry.* v. *Federation,* 300 U. S. 515, 553; *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, 570." United's obligation under the Act is *not "to interfere in any way with the organization of its employees."* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation de-

signed to block or delay representation elections conducted by the National Mediation Board.

5. There is no *Leedom* v. *Kyne*, 358 U. S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom*. This principle has been expounded recently by this court in a series of cases so there should be no doubt about its application. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, *supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7. In the *UNA* case we said (111 U. S. App. D. C. at 124, 294 F. 2d at 908):

> "Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in Leedom v. Kyne, 1958, 358 U. S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210. We cannot agree. In Leedom the Supreme Court carefully differentiated Switchmen's Union from the case before it, pointing out that the latter did not involve 'review' of agency action, but the striking down of action *in excess of delegated powers, in flat violation of the controlling statute*—there the Labor Management Relations Act, 29 U. S. C. A. § 141 et seq. See 358 U. S. at pages 188-190, 79 S. Ct. at pages 183-184. It should be noted, also, that in Leedom v. Kyne the National Labor Relations Board *did not deny* that it had contravened its governing statute. See 358 U. S. at page 187, 79 S. Ct. at page 183. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. * * *" (Emphasis added.)

6. There is a demonstrable lack of equity in the application for the injunction against holding the election. ABNE, the no-contract employees' group, claims it repre-

sents more than half of the employees eligible to vote in the election. If so, its remedy is to tell its members either not to vote or to vote for no representation. As shown, if its membership complies with these instructions, there will not be a majority voting for representation and, consequently, no representative will be certified. As indicated during oral argument, this was precisely the result of the voting—or not voting—in the representation election held recently at Lake Central Airlines. No irreparable injury is shown, therefore, if the election here is conducted as ordered by the Board.

This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. See, *e.g.*, *Adair* v. *United States*, 208 U. S. 161 (1908); *Adkins* v. *Children's Hospital*, 261 U. S. 525 (1923). I thought those days were over.

I regret my inability to agree with my distinguished brethren in respect to this litigation. Respectfully I dissent from the court's ruling upholding this injunction.

APPENDIX C.

UNITED STATES DISTRICT COURT
For the District of Columbia.

United Air Lines, Inc., *Plaintiff*,
vs.
National Mediation Board, et al., *Defendants*.
Civil No. 402-63.

Order.

Upon consideration of defendants' motion to dismiss or in the alternative for summary judgment, plaintiff's motion for preliminary injunction, and the Court having considered the pleadings, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to said motions, and after hearing oral argument by counsel for the respective parties in open court, and the Court having determined that there is no genuine issue of material fact it is by the Court this 25th day of March, 1963,

ORDERED: that defendants' motion for summary judgment be, and the same is, hereby granted; and the complaint be, and the same hereby is, dismissed with prejudice, and it is

FURTHER ORDERED: that plaintiff's motion for preliminary injunction be, and the same hereby is dismissed as moot.

BURNITA SHELTON MATTHEWS,
United States District Judge.

Seen
STUART BERNSTEIN.

APPENDIX D.

Constitutional and Statutory Provisions Involved.

U. S. Constitution, Amend. V:

"... [N]or shall any person ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Railway Labor Act:

Section 2 Fourth, 48 Stat. 1187, 45 U. S. C. § 152 Fourth:

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, in-

dividually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2 Ninth, 48 Stat. 1188, 45 U. S. C. § 152 Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Wagner Act:

Section 7, 49 Stat. 452:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 9(a), 49 Stat. 453:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

NATIONAL MEDIATION BOARD, ET AL., PETITIONERS

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Mediation Board and its members, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 12, 1964.

OPINIONS BELOW

The opinions of the district court (Appendix A, *infra*, pp. 23–58) are reported at 218 F. Supp. 114. The opinion of the court of appeals (App. A, *infra*, pp. 13–22) is reported at 330 F. 2d 853.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1964 (App. A, *infra*, p. 22). By orders of the Chief Justice, dated June 10, 1964, and June

29, 1964, the time for filing a petition for a writ of certiorari was extended to and including August 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district court is authorized to stay an order of the National Mediation Board directing a representation election upon the ground that the form of the ballot provided by the Board contains no space in which employees may vote not to be represented by any union.

2. Whether a district court is authorized to stay an order of the National Mediation Board directing a representation election upon the ground that the Board failed to grant a sizeable group of employees opposed to collective representation a hearing upon the "craft or class" appropriate for collective representation.

STATUTES INVOLVED

The pertinent provisions of Section 2 of the Railway Labor Act, as amended in 1934, 44 Stat. 577, 45 U.S.C. 151a–152, are set forth in Appendix B, *infra*, pp. 59–61.

STATEMENT

In August 1962, the National Mediation Board was requested by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, to investigate a representation dispute among employees of United Air Lines in a craft or class known as "clerical, office, stores, fleet and

passenger service employees" (R. 35–36).[1] The Brotherhood's application was amended in October 1962 to cover certain employees in that craft who had been excluded under the August application (R. 37). The craft or class covers over 12,000 non-technical ground employees of the airline, ranging from office clerks and public contact personnel to aircraft cleaners (R. 62, 130).[2] Some of them had been represented by the International Association of Machinists (R. 36–37). After investigation, the Board determined that the Brotherhood had obtained a sufficient number of authorization cards under the Board's rules—35 percent—to warrant a finding that a representation dispute existed; and on December 19, 1962, the Board ordered an election to resolve the dispute (R. 37).

The Board provided that the form of ballot used should conform to that which it has used continuously under the Railway Labor Act since 1934 (R. 45, 87, 161). It is a secret ballot (R. 127). On it appear printed names and spaces in which an employee may mark his desire to be represented by any labor organization which is a party to the dispute, here the Brotherhood of Railway and Steamship Clerks or the International Association of Machinists (R. 127). In addition, the ballot contains a space in which the employee can write in, and mark his preference for, any

[1] "R" references are to the printed joint appendix in the court of appeals.

[2] In 1947, after lengthy hearings, the National Mediation Board determined that these employees constituted an appropriate single craft for collective bargaining purposes (R. 62–63, 77).

other organization or individual he wishes to represent him (R. 127).

The form of ballot does not include a space where the employee may mark a vote against any representation. However, if less than a majority of the employees eligible to vote cast valid ballots for a representative, the Board will not certify a representative and will dismiss the application. Under this procedure an employee who does not wish to be represented may give effect to his views by declining to vote, by writing "no representative" on the ballot or by voiding the ballot in some other manner (R. 46, 98). While this procedure is not explained on each ballot, the Board has published it as part of a general pamphlet describing its practices.[3] The procedure is also described in several of the Board's annual reports, and was referred to by United in the course of its letter to the Board requesting a change in the ballot form (R. 79–80).

The employer, United Air Lines, objected to the election on the ground that the craft or class established by the Board in 1947 after industry-wide hearings[4] should be reconsidered and divided into three new groups or crafts: office and clerical employees; customer contact employees; and ramp and store employees (R. 61–69). United requested a hearing on this question. United also protested the form of the ballot to be used, on the ground that it failed to

[3] *Administration of the Railway Labor Act By the National Mediation Board. 1934–1957.* (Government Printing Office, 1958), pp. 16–18.

[4] United and other carriers participated in these hearings at the Board's invitation (R. 63).

provide a space to be marked by employees wishing no collective representation (R. 79). After much correspondence, the Board, rejecting United's contentions, declined to change the ballot, and stated that it could "see no justification to open the class or craft question * * *" (R. 72, 76–78, 86–88, 96–98).

The election, which had been ordered in December 1962, was delayed because of the controversies with United over the form of the ballot and the appropriate craft, and because of United's refusal, during the controversy, to make available to the Board the names of the employees involved (R. 61–100). During the delay a group of United's employees formed an association to oppose collective representation, called the Association for the Benefit of Non-Contract Employees, the respondent herein (R. 102–105). By the end of March 1963, the respondent claimed a membership of 6,400 workers, more than half of the employees involved (R. 6, 18). Respondent applied to the Board for leave to intervene, for a hearing on and a redetermination of the appropriate craft or class, and for a change in the form of ballot (R. 102–111). Its arguments paralleled those advanced by United (R. 102–111). Respondent expressly disavowed any purpose of representing the employees as a bargaining agent and stated that it would be dissolved after accomplishing its object of securing changes in the craft and form of ballot (R. 111).

The National Mediation Board denied respondent's petition to intervene because the Association did not seek to appear as a party to the dispute for the purpose of representing employees as a collective bar-

gaining agent. The Board also denied respondent's requests for a redetermination of the craft and a change in the form of ballot (R. 14–18).

After its position was rejected by the Board, United filed a complaint in the district court on February 12, 1963, seeking an injunction restraining the Board from conducting an election without first conducting a hearing on the craft or class issue, and restraining the Board from conducting any election using the ballot which the Board had previously been using and intended to use. The district court (Matthews, J.) granted summary judgment for the Board and dismissed United's complaint. While the district court gave no reasons, the court of appeals later "assume[d]" that the complaint was dismissed for lack of standing (App. A, *infra*, p. 15).

Shortly after the district court dismissed United's suit, the respondent filed a complaint against the Board in the district court, similarly attacking the refusal of a hearing on the craft or class issue and the form of ballot (R. 4–9). The district court (Hart, J.) entered a temporary restraining order against the election which had been re-scheduled for April 1963 (R. 128). Subsequently, the district court (Youngdahl, J.) held that it had jurisdiction to determine the merits of the controversy (App. A, *infra*, pp. 36–42), that the ballot used by the Board violated the Railway Labor Act (App. A, *infra*, pp. 49–53), and that "an injunction should issue barring the Board from proceeding with the scheduled election unless the ballots are changed to provide a space in which the voters can

vote for no representation" (App. A, *infra*, p. 53).[5] Thereafter, the court entered orders granting a preliminary injunction and then a permanent injunction against holding an election using the Board's traditional form of ballot (App. A, *infra*, p. 14). As to respondent's request for a hearing on the craft or class, the court remanded the matter for reconsideration by the Board "in the light of the Court's conclusion that the Railway Labor Act * * * gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation" (App. A, *infra*, p. 14).

Appeals from the district court's decisions were noted respectively by the carrier (No. 17,777), by the National Mediation Board (No. 18,068) and by the Brotherhood of Railway and Steamship Clerks (No. 18,072), which had intervened in the respondent's action (R. 172–173). The three appeals were consolidated (App. A, *infra*, p. 13).

The court of appeals in a *per curiam* opinion (Miller and Bastian, J.J.) affirmed the decisions in Nos. 18,068 and 18,072 on the basis of the district court's opinion (App. A, *infra*, pp. 13–15). The court also affirmed the dismissal of United's suit on the ground that the affirmance in the other two cases "affords the relief concerning the form of the ballot which

[5] In reaching this conclusion, the district court noted that since 1937 the National Labor Relations Board has used a ballot form which provides a space in which employees may indicate that they do not desire to be represented by any union. *Interlake Iron Corp.*, 4 N.L.R.B. 55. Excerpts from the Board's *Interlake* opinion explaining the basis for its action are set forth in Judge Youngdahl's opinion. App. A, *infra*, pp. 51–52.

The form of ballot prescribed by the National Mediation Board in this case has been consistently used in over 3400 representation elections since 1934. Currently, the Board is conducting about 70 elections a year with this form of ballot. Since the district court's decision, eight other suits have been filed challenging the validity of representation elections because of the form of ballot; four are still pending.[7] The Board, an independent and expert agency created by the Congress, is convinced that the present form of ballot conforms to the language and intent of the Railway Labor Act. Its view has the sanction of consistent administrative interpretation accompanied by long continued acquiescence. Although the Solicitor General feels sufficient doubt concerning the correctness of the Board's view to refrain from endorsing it at this stage, the question is plainly one of great importance which, if judicially reviewable, can be resolved only by this Court. Until it or the question of judicial review is resolved, the validity of all National Mediation Board certifications will be open to question.

2. The question whether a district court has authority to stay an election ordered by the Mediation

[7] Pending: *Capitol Airways, Inc.* v. *National Mediation Board* (No. 18,516, C.A.D.C.); *World Airways, Inc.* v. *National Mediation Board* (Civil No. 42045, N.D. Cal.); *Lind* v. *National Mediation Board* (Civil No. 1230–64, D.C.D.C.); *Haddad* v. *National Mediation Board* (Civil No. 1739–64, D.C.D.C.). Terminated: *Droggos* v. *National Mediation Board*, 227 F. Supp. 61 (N.D. Ohio); *Lake Central Airlines* v. *National Mediation Board* (Civil No. 63–C275, S.D. Ind.); *Transportation Corporation of America* v. *National Mediation Board* (Civil No. 1947–63, D.C.D.C.); *Lynch* v. *National Mediation Board* (Civil No. 1949–63, D.C.D.C).

Board upon the ground that the Board denied a sizeable group of employees opposed to all collective representation a hearing upon the "craft or class" also involves consideration both of the scope of judicial review of the Board's conduct of representation proceedings and also of the sufficiency of the non-contract employees' interest in the investigation to entitle them to a hearing. While neither the district court nor the court below discussed the point at length, the order of the district court, which was affirmed by the court of appeals, apparently bars the Board from holding an election until it has reconsidered the employees' request for a hearing.[8] If the Board properly denied the request, or if that question is unreviewable, then the order must be reversed.

Up to now attempts to stay Mediation Board elections on the ground that the complainant was denied a hearing have been rejected upon authority of the *Switchmen's* case. *E.g., Airline Stewards and Stewardesses Association* v. *National Mediation Board,* 294 F. 2d 910 (C.A.D.C.), certiorari denied, 369 U.S. 810. *Cf., Ruby* v. *American Airlines, Inc.,* 323 F. 2d 248, 255 (C.A. 2), certiorari denied, 376 U.S. 913. *Leedom* v. *Kyne* does not support a different conclusion. The Railway Labor Act contains no explicit requirement of a hearing. The Act leaves the entire manner of in-

[8] While the portion of the order directing the Board to reconsider respondent's request for a hearing on the appropriateness of the craft did not expressly stay the election until the Board reconsiders the craft question (R. 171), nevertheless this would seem to be implicit in the order and was the relief sought by respondent (R. 9).

18,072 should be disposed of first, although they are later in their numbering.

In No. 18,068, the National Mediation Board appeals from an order issued by the District Court which, among other things, restrains the Board from conducting a representation election.

In No. 18,072, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes appeals from the same order.

The order appealed from is as follows:

> ". . . ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 et seq gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

The opinion of Judge Youngdahl, of the District Court, is found in 218 F. Supp. 114 (1963) and is adopted by us as the opinion of this court. It follows that the judgment of the District Court in these cases must be affirmed.

In No. 17,777, United Air Lines, Inc. appeals from the dismissal by the District Court of its action filed to enjoin the election proposed by the National Medi-

ation Board. The grounds for dismissal of the action are not stated in the court's order but, as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed. The close question as to United's standing, about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the District Court's dismissal, because our decision in the other two cases affords the relief concerning the form of the ballot which United sought.

No. 18,068 is affirmed.
No. 18,072 is affirmed.
No. 17,777 is affirmed.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part:* In No. 17,777 of this consolidated litigation, United Air Lines appeals from the District Court's refusal to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth, of the Railway Labor Act. 48 Stat. 1188, 45 U.S.C. § 152, Ninth. In Nos. 18,068 and 18,072, the National Mediation Board and the Brotherhood of Railway and Steamship Clerks appeal from the granting of an injunction against the Board, by the same court through a different judge, restraining it from conducting the same election which is the subject of the United Air Lines suit. The second injunction action was brought [1] by certain employees of United Air Lines who claim to want to represent themselves *individually* in their labor negotiations with their employer. I agree with the court that in No. 17,777 the United Air Lines injunction proceeding was properly dismissed by the District Court. I respectfully dissent from its affirm-

[1] The employees' action was brought after United Air Lines' application for an injunction was denied.

ance in Nos. 18,068 and 18,072 upholding the issuance of the injunction against the National Mediation Board.

Since the United Air Lines suit and the action brought by some of its employees appear to have a common inspiration as well as common issues, I shall treat them together. Both United and its appellee employees, here called ABNE,[2] urge two grounds for enjoining the Board from performing its duty under the Act: (1) The Board improperly determined the bargaining unit craft or class to be "clerical, office, stores, fleet and passenger service employees"; and (2) the Board proposes to use in the election a form of ballot which does not provide a space for the employee to vote against representation.

The craft or class recognized by the Board as the proper bargaining unit for the proposed election is the same as that recognized in its 1947 proceeding. Case No. R-1706, Determinations of Craft or Class of the National Mediation Board (1947). There has been no change in the classification since that time. After considering the representations by United as to the need for change, the Board determined that it would follow its prior ruling. Thus United and ABNE would have the court reweigh these class considerations and substitute its judgment for the Board's.

With reference to the form of ballot, space is provided to vote for either of the competing unions.[3] A third blank space is indicated for voting for a representative not named on the ballot. That same blank space may be used for voting for "no union" or "no rep-

[2] Association for the Benefit of Non-Contract Employees.

[3] The two competing unions shown on the ballot were the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists.

resentation." Section 2, Fourth,[4] of the Railway Labor Act provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Thus, if a majority of the craft or class actually votes for representation, a representative may be selected. If a majority fails to vote, the Board may not certify a representative. *Radio Officers' Union* v. *National Mediation Board*, 86 U.S. App. D.C. 319, 181 F. 2d 801 (1950). In addition, the admitted practice of the Board is to add the number voting "no union" to the number not voting in determining whether a majority of the employees eligible to vote actually voted for representation.

The District Court's action enjoining the Board from conducting the election here is in the teeth of a host of cases from the Supreme Court, from this court, and from the Circuit Courts around the country. In the interest of economy, I shall simply list *seriatim* the reasons why this injunction should not have been issued and briefly comment on each.

1. The District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). In upholding the action of the Board against union attack, the Court in *Switchmen's Union* said, "* * * if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain." 320 U.S. at 303. (Emphasis added.) Unlike the National Labor Relations

[4] 48 Stat. 1187, 45 U.S.C. § 152, Fourth.

Act,[5] the Railway Labor Act has no provision for judicial review. *Switchmen's Union* was reinforced by three other cases[6] handed down by the Supreme Court at the same term, and the force of these decisions has continued, unmodified by Congress, down to the present day.[7]

2. The ballot which the District Court has ordered changed before an election can be conducted has been used by the Board and its predecessor, the Railway Labor Board, since 1921 in over 3,400 elections. In the 43 years since 1921, Congress has not indicated the slightest disapproval of the Board's election machinery—including its ballot. Moreover, no court,

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[5] 49 Stat. 453, 29 U.S.C. § 159(d).

[6] *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338 (1943); and *Brotherhood of Railway & Steamship Clerks, etc.* v. *United Transport Service Employees*, 320 U.S. 715 (1943) (*per curiam*).

[7] *Order of Railway Conductors* v. *National Mediation Bd.*, 79 U.S. App. D.C. 1, 141 F. 2d 366, *cert. dismissed*, 323 U.S. 166 (1944); *Radio Officers' Union* v. *National Mediation Board, supra; Rutas Aereas Nacionales, S.A.* v. *Edwards*, 100 U.S. App. D.C. 366, 244 F. 2d 784 (1957); *Decker* v. *Venezolana*, 103 U.S. App. D.C. 301, 258 F. 2d 153 (1958); *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board*, 111 U.S. App. D.C. 126, 294 F. 2d 910 (1961), *cert. denied*, 369 U.S. 810 (1962); *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.*, 111 U.S. App. D.C. 121, 294 F. 2d 905 (1961), *cert. denied*, 368 U.S. 956 (1962); *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd.*, 114 U.S. App. D.C. 229, 314 F. 2d 234 (1962). Among decisions from other courts are *Brotherhood of Ry. & S. Clerks, etc.* v. *Virginian Ry. Co.*, 4 Cir., 125 F. 2d 853 (1942); *Rose* v. *Brotherhood of Railway and Steamships Clks.*, 4 Cir., 181 F. 2d 944, *cert. denied*, 340 U.S. 851 (1950); *Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 2 Cir., 311 F. 2d 745, *cert. denied*, 373 U.S. 924 (1963); *Ruby* v. *American Airlines, Inc.*, 2 Cir., 323 F. 2d 248 (1963), *cert. pending.*

except the District Court here, in the ABNE case but *not* in the United case, has found this ballot unlawful.[8] And this court has approved its use as a proper exercise of the Board's discretion within the intendment of the Act. *Decker* v. *Venezolana, supra* Note 7 (see briefs).[9]

3. The Board's craft or class determination is unreviewable. This court has so held in at least four cases, one at the last term of court. *WES Chapter, Flight Eng. Int. Ass'n.* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note 7; *Radio Officers' Union* v. *National Mediation Board, supra.* The Fourth Circuit, in *Rose* v. *Brotherhood of Railway and Steamship Clks., supra* Note 7, 181 F.2d at 946, summed it up well:

> "In the light of the decisions of the Supreme Court, there can be no doubt that the effect of this statute was to vest in the Mediation Board

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[8] But *cf. McNulty* v. *National Mediation Board*, N.D.N.Y., 18 F. Supp. 494 (1936).

[9] The *Decker* case involved the jurisdiction of the District Court to review the action of the Mediation Board. Paragraph 8 of the amended complaint there raised the same issue which is raised here:

> "[Due process was denied] in that the ballot used in the election had no space on it for a vote to the effect that the employee did not want anyone, defendant I.A.M. or anyone else, to represent him."

That issue was preserved on appeal, in paragraph 1b of the Questions Presented:

> "* * * the right to [due process] was denied by use of a ballot which gave no way to vote against representation by any bargaining agent."

Affirming the dismissal of the complaint, this court stated, "We hold that the prohibition of the Switchmen's case applies in the circumstances of this case." 103 U.S. App. D.C. at 302, 258 F. 2d at 154.

exclusive jurisdiction over the *certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining.* And it is equally clear that the *exercise of discretion by the board with respect to such matters is not subject to review by the courts.* * * *" (Emphasis added.)

4. United Air Lines lacks standing to challenge the Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, "to put an end to the harmful consequences of * * * individual dealing between large carriers and small employees. *Machinists* v. *Street*, 367 U.S. 740, 760; *Virginian Ry.* v. *Federation*, 300 U.S. 515, 553; *Texas & N.O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 570." United's obligation under the Act is *not "to interfere in any way with the organization of its employees."* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation designed to block or delay representation elections conducted by the National Mediation Board.

5. There is no *Leedom* v. *Kyne*, 358 U.S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom*. This principle has been expounded recently by this court in a series of cases so there should be no doubt about its application. *WES Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Bd., supra* Note 7; *Air Line Stewards & Stewardesses Ass'n* v. *National Mediation Board, supra* Note 7; *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd., supra* Note

7. In the *UNA* case we said (111 U.S. App. D.C. at 124, 294 F. 2d at 908):

> "Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in Leedom v. Kyne, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L. Ed. 2d 210. We cannot agree. In Leedom the Supreme Court carefully differentiated Switchmen's Union from the case before it, pointing out that the latter did not involve 'review' of agency action, but the striking down of action *in excess of delegated powers, in flat violation of the controlling statute*—there the Labor Management Relations Act, 29 U.S.C.A. § 141 et seq. See 358 U.S. at pages 188–190, 79 S. Ct. at pages 183–184. It should be noted, also, that in Leedom v. Kyne the National Labor Relations Board *did not deny* that it had contravened its governing statute. See 358 U.S. at page 187, 79 S.Ct. at page 183. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. * * *" (Emphasis added.)

6. There is a demonstrable lack of equity in the application for the injunction against holding the election. ABNE, the no-contract employees' group, claims it represents more than half of the employees eligible to vote in the election. If so, its remedy is to tell its members either not to vote or to vote for no representation. As shown, if its membership complies with these instructions, there will not be a majority voting for representation and, consequently, no representative will be certified. As indicated during oral argument, this was precisely the result of the voting—or not voting—in the representation election held recently at Lake Central Airlines. No irreparable injury is shown, therefore, if the election here is conducted as ordered by the Board.

This litigation is a throwback to the early days of the 1900's when federal courts were used to deliver individual workmen unrepresented to the bargaining table of their employer. See *e.g., Adair v. United States,* 208 U.S. 161 (1908); *Adkins v. Children's Hospital,* 261 U.S. 525 (1923). I thought those days were over.

I regret my inability to agree with my distinguished brethren in respect to this litigation. Respectfully I dissent from the court's ruling upholding this injunction.

2. JUDGMENT OF THE COURT OF APPEALS

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court:

(1) that the judgment of the District Court on appeal in cases Nos. 18,068 and 18,072 is hereby affirmed; and

(2) that the judgment of the District Court on appeal in case No. 17,777 is also affirmed.

Per Curiam.

Dated: March 12, 1964.

Separate opinion by Circuit Judge Wright concurring in affirmance in case No. 17,777 and dissenting from affirmance in cases Nos. 18,068 and 18,072.

3. Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 973–63

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, PLAINTIFF

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; AND HOWARD G. GAMSER, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD, DEFENDANTS

On April 18, 1963, Judge Hart of this court issued a temporary restraining order barring the National Mediation Board from proceeding with an election among certain categories of employees of United Air Lines for the selection of a collective bargaining representative, pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq*, as made applicable to employees of air carriers, 45 U.S.C. §§ 181–8. Ballots had been scheduled to be sent out by mail to the employees on April 22, 1963. The temporary restraining order barred the mailing of these ballots pending the hearing, in this Court, on a motion for a preliminary injunction. This hearing was held on April 24, and this Court continued the temporary restraining order in effect so that the Court could consider fully the written memoranda and oral arguments of counsel and the complex legal issues raised in those arguments before finally issuing its order.

The Court now issues its order, on the basis of the following findings of fact and conclusions of law.

Findings of Fact

1. This is an action brought by a group of employees of United Air Lines, Inc. (hereinafter called "United"), organized and incorporated under the name "Association for the Benefit of Non-contract Employees," the plaintiff herein. Plaintiff does not seek recognition as a bargaining agent, nor does it want its name on the ballot.

2. On August 24, 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter called the "Brotherhood"), filed an application with the National Mediation Board pursuant to 45 U.S.C. § 152, Ninth, of the Railway Labor Act, for an investigation of a representation dispute among employees of United. The case was docketed as Case No. R-3590 by the Board. On November 19, 1962, the Mediator assigned by the Board began an investigation of this dispute and checked the authorization cards from thirty-five percent or more of the employees in the craft or class furnished by the Brotherhood in support of its application. As a result of the Mediator's investigation, it was determined that a representation dispute existed among these employees, between two unions, the Brotherhood and the Internatinoal Association of Machinists (hereinafter called "Machinists"). On December 19, 1962, in accordance with its rules, an election was authorized by the Board, and the Mediator asked United to furnish the names and addresses of eligible employees so the election could be held. Both the Brotherhood and the International sought to be certified as the collective bargaining representative, and both of their names appear on the ballot which the Board has prepared.

3. The "craft or class" in which this representation dispute exists is defined by the Board as "Clerical, Office, Stores, Fleet and Passenger Service employees" of United. This "craft or class" was established by the Board in 1947. There are approximately 12,300 employees certified to vote in this election as members of this craft or class. The plaintiff purports to represent 6,400 of these employees. Cards signed by these employees authorizing the plaintiff to represent the employee before the Board are in the possession of the Board. The Board has made no attempt to verify the number of authorization cards, nor to check the signatures on the cards against the eligible list of voters.

4. The official ballot provides a square in which the voter can mark an "X" if he wishes to be represented by the Brotherhood, another square to be marked if he wishes to be represented by the International, and a blank line where the voter can write the name of an organization or an individual "[i]f you desire to be represented by ANY OTHER ORGANIZATION OR INDIVIDUAL." There is no place on the ballot where a voter could state that he prefers no collective bargaining representation. If a voter should write "no representation" or "no union" on the ballot, the ballot would be counted by the Board as void. The ballots are secret, and returnable by mail.

5. On February 14, 1963, the Board received from the plaintiff a petition asking leave to intervene in the representation dispute and asking that the class or craft grouping be changed either with or without a hearing, and that the form of the ballot be changed to permit the voters to express a preference for no collective bargaining representation. On February 25, 1963, the plaintiff forwarded to the Board a statement which included the following points:

1. We are not seeking recognition as a bargaining agent; we do not want our name on the ballot.

2. We have no intention of becoming a Company union.

3. We are not sanctioned, recognized, or assisted in any way by United Airlines management.

4. Our Association will be dissolved after such time as it has served its purpose.

The Board determined that the plaintiff was not a properly constituted party at interest in the pending dispute, and on March 27, 1963, informed the plaintiff that its petition was dismissed. On April 5, 1963, the plaintiff requested the Board to reconsider its denial of the petition to intervene. On April 12, 1963, the Board denied plaintiff's request for reconsideration. The present suit was filed on April 13, seeking to enjoin the Board from mailing out the ballots on the scheduled date of April 22, 1963.

Conclusions of Law

Based on the findings of fact heretofore set forth, and for the reasons fully set forth in a memorandum attached hereto, which memorandum is specifically made a part of these findings of fact and conclusions of law, the Court has reached the following conclusions:

1. The Court has jurisdiction over the subject matter of this action.

2. The plaintiff would be irreparably injured by the holding of said election without having an opportunity to express on the ballot a preference for no collective bargaining representation.

3. The balance of convenience is in favor of the plaintiff.

4. The public interest requires a determination of the legality of the above election before the ballots are sent out.

5. The Railway Labor Act, 45 U.S.C. § 151 *et seq*, requires that there shall be on the above ballots a place where eligible voters may express a preference for no collective bargaining representation.

WHEREFORE, it is by the Court this 3d day of May, 1963,

ORDERED That the plaintiff's motion for a preliminary injunction enjoining the defendant from conducting any election among the "Clerical, Office, Stores, Fleet and Passenger Service employees" of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation shall be and the same is hereby granted, and it is

FURTHER ORDERED That the defendant shall have one week from today's date to show cause why the preliminary injunction above granted shall not be made permanent, and it is

FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class of craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 *et seq* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation.

LUTHER W. YOUNGDAHL,
Judge.

MEMORANDUM

This memorandum shall specifically be considered a part of the findings of fact and conclusions of law, *supra*.

I. PRELIMINARY INJUNCTION

1. *Jurisdiction.*

This action raises serious questions involving the proper interpretation of certain provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* For the reasons fully set forth in Part II, *infra*, this Court has judisdiction to issue a permanent injunction. Wherever equity has jurisdiction to grant an injunction by final decree, it has jurisdiction to grant a preliminary injunction. *American Code Co.* v. *Bensinger*, 282 F. 829, 835 (2d Cir. 1922).[1]

2. *Appropriateness of Preliminary Injunction.*

"The award of a preliminary injunction is an extraordinary remedy which will not be granted unless upon a clear showing of probable success and possible irreparable injury to plaintiffs * * *." *Societe Comptoir de L'Industrie Cotonniere Etablissements*

[1] Nor is the present application for a preliminary injunction in any way barred by the fact that another judge of the District Court, as well as the Court of Appeals, have both denied a preliminary injunction in another case which involves the same disputed election, *United Airlines, Inc.* v. *National Mediation Bd.*, Civil No. 402–63, now on appeal, since it was agreed at oral argument before me that one of the important issues argued before both courts in that case was the question of whether the employer, United Airlines, had standing to enjoin an election among its employees—an issue obviously not in any way involved in the present application, and since it was further agreed that the orders in that case do not indicate the grounds for the two denials. Both courts in the other case may well have decided largely on the basis of this issue of the employer's standing.

Boussac v. *Alexander's Dep't Stores, Inc.*, 299 F. 2d 33, 35 (1962).

> The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. * * * Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. * * * But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944).
>
> The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate * * * carrier to perform its service to the public, is a matter of public concern. * * * Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. *Virginia Ry. Co.* v. *System Fed'n 40, Ry. Employees Dep't*, 300 U.S. 515, 552 (1937).

Taking into account the above principles, this Court, to grant a preliminary injunction which would bar the National Mediation Board from proceeding with the disputed election, must conclude that the plaintiff may be irreparably injured by the holding of such election; that the balance of convenience favors the plaintiff in the sense that the inconvenience which

would flow to it from holding the election is greater than the inconvenience which would flow to the National Mediation Board from postponing the election; that the public interest will be advanced, not injured, by postponing the election; and that the plaintiff has made a clear showing of probable success in the ultimate determination of the merits.

Since the Court in Part II, *infra,* has decided to reach and determine the ultimate merits of the controversy, and since the Court therein has concluded that the scheduled election, if held, would be illegal under the Railway Labor Act, 45 U.S.C. § 151 *et seq,* the Court need consider here only the issues of irreparable injury, balance of convenience, and protection of the public interest.

a. *Irreparable Injury.* It is almost certain that the plaintiff would be irreparably injured if the scheduled election were to be held. As an association which seeks to have no collective bargaining representation, this association represents employees of United Airlines who do not wish to be joined with other employees who wish collective bargaining representation. The only way that the plaintiff can achieve its aim of having no representation, under the current procedure of the National Mediation Board, is to have a majority of the eligible voters actually refrain from returning a ballot. In that event, the Board will refuse to certify any collective bargaining representative. The chance of such a result, however, is slim, because the Board has refused to state, in its instructions sent to each eligible voter, that such is the Board's policy. If, instead of refraining to vote, the voter returns a ballot marked "No representation" or "No union," the ballot will be counted for purposes of participation, but will be tabulated as void; the voter would thus cast a ballot against the very position he

seeks to support. Furthermore, even if this Association were to undertake to instruct all of its members not to return any ballot, the Board has not made clear exactly what must be done. Should the voter wishing to vote to have no collective bargaining representation simply fail to return anything? Or should such voter return, empty, either one or both of the two envelopes distributed by the Board—the "mailing envelope" and the "secret envelope marked 'A' "? If one or both of the envelopes should be returned, should the voter place his name and address on the envelope, or should he leave that blank?[2] The procedure which this Association should instruct its members to follow is, therefore, highly ambiguous, and the Board has indicated that it will take no action to correct the ambiguity.

What irreparable injury would result to the plaintiff from trying to follow such an ambiguous procedure? For one thing, for this Association even to *engage* in a campaign to urge employees *not* to vote opens the Association to charges by other employees that the Association employees are in some way opposed to democratic electoral procedures. To be sure, such "Don't vote" campaigns are occasionally thought necessary even in the most democratic of electoral procedures; but there is no doubt that even when necessary, such campaigns may leave the reputations of those conducting the campaign besmirched.

In addition, if the Association should not succeed in persuading a majority of eligible voters to refrain from returning their ballots, and the Board were therefore to certify a collective bargaining representative on the basis of the vote, in conformity with its

[2] The "Instructions for Voting by Mail" state: "YOUR BALLOT CANNOT BE COUNTED UNLESS YOU PLACE YOUR NAME AND ADDRESS ON THE MAILING ENVELOPE." (Exhibit 23.)

stated policy,[3] then there is serious question whether any court would have jurisdiction to examine the legality of the electoral procedure. The Supreme Court has held that in at least one situation, federal District Courts do not have "the power to review the action of the National Mediation Board in issuing the certificate." *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 300 (1943). But see *Airline Dispatchers Ass'n* v. *National Mediation Bd.*, 89 U.S. App. D.C. 24, 27–8 (1951). And see *infra*, Part II, for further discussion. Such doubts about the availability of another remedy to correct the results of illegal governmental action can constitute part of the basis for a finding of irreparable injury, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952), especially when the actual damages, both present and future, are "of such nature as to be difficult, if not incapable, of measurement." *Ibid.* This Court therefore concludes that it is extremely likely that the plaintiff herein would be irreparably injured if the scheduled election were to proceed.

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[3] The Board has also argued that there is no irreparable injury because it is not clear that the Board will certify a collective bargaining representative on the basis of the election, and hence that an injunction would be "premature." At the hearing on the motion for a preliminary injunction, however, the Board made clear that the only basis on which it would not certify a representative on the basis of the electoral results was if a majority of eligible voters failed to participate: "Under the practices of the Board there will be no certification of a representative unless a majority of those eligible to vote affirmatively, vote." (Statement of Mr. Leathers at the hearing.) The same policy of the Board was stated in Mr. Thompson's affidavit: "The Board does not issue a certification after a representation election has been held unless a majority of those eligible to participate in the election have cast valid ballots." (Affidavit, p. 11.)

b. *Balance of Convenience.* The Board has made only the most general allegations of the inconvenience to it of having the election delayed:

> Delay will be unfair to the Board, which has already spent considerable time and effort assembling timely data necessary to proceed with an election. Much of this effort would be nullified by further delay in the election. (Board's Memorandum in opposition to plaintiff's motion for preliminary injunction, p. 24.)

This statement is amplified in the affidavit of E. C. Thompson, Executive Secretary of the Board, as follows:

> The Board's records on Case R–3590 show this case has been under active handling by the Board since August 27, 1962 and a dispute was found to exist among the craft or class of employees involved on December 19, 1962. The Board's mediators have spent approximately three months in preparing a list of the eligible employees from the carrier's records due to the refusal of the carrier to furnish that information to the mediators. The eligible list has now been completed and agreed to by the contesting organizations, namely the BRC [the Brotherhood] and the IAM [the International]. The notice of election and ballots have been printed and the mediator is now in the process of preparing the ballots for mailing to the eligible employees. Any further delay at this time would nullify much of the effort expended by the Board to conduct an election. (Affidavit, p. 12.)

The very delays which the Board recounts, however, argue against any severe inconvenience from a further delay, since an election postponed this long can easily wait to have its legality determined. And the fact that the Board has already printed ballots is obviously a trifling argument in the face of the possible irrepa-

rable injuries to the plaintiff from the use of those very same ballots. The Court, therefore, concludes that the balance of convenience must be resolved in favor of the plaintiff.

c. *Public Interest.* The Board's allegations concerning the public interest in a speedy election are similarly general:

> It is in the public interest that the procedures of the [Railway Labor] Act, as applied by the Board in the light of its long and successful experience in railroad and airlines labor relations, should be promptly carried out. * * * The public interest would not be served by an injunction which delays settlement of this dispute. * * * Moreover, the granting of an injunction would injure those parties directly involved in this representation proceeding. The two unions involved are directly concerned. Delay of the election may seriously impair their organizing campaigns, which necessarily depend upon the timing of the election. Delay will also be unfair to the employees who have furnished auhorization cards to the unions, indicating their desire to have the issue investigated by the Board and resolved through an election. (Board's Memorandum, *supra,* p. 22–4.)

There is no showing here of the need for any immediate negotiations between the employer and some collective bargaining representative, nor is there any showing of any threatened strikes or other threat to the continued services of the carrier. Indeed, this Court believes that more bitterness would probably be engendered by the holding of an election, the results of which might later be set aside as illegal, than by postponing the election pending a determination of its legality. In addition, the two unions which are organizing their campaigns should surely be saved the

expense of a second campaign which would be necessary if the results of the first election were set aside as illegal. Since the Board has failed to make a more precise showing that the public interest requires a speedy election, the Court is not intruding upon any preliminary findings which the Board's expertise might have entitled the Board to make; the Court therefore concludes that the interest of the public can best be served by a determination of the legality of the scheduled election now.

Because there is an extreme likelihood that plaintiff would be irreparably injured by the holding of the scheduled election, because the balance of convenience is in plaintiff's favor, and because the public interest requires that the legality of the election be determined before such election is held, the Court, pursuant to Rule 65, *Fed. R. Civ. P.*, will grant a preliminary injunction barring the scheduled election pending the final determination of the merits of this controversy.

II. THE MERITS

The Board has conceded that the plaintiff seeks, by the motion for preliminary injunction, the ultimate relief requested; indeed, the Board argues on this basis that the motion for a preliminary injunction should be denied, since a preliminary injunction should not be a means of obtaining such relief before a full consideration of the merits. (Memorandum in opposition to plaintiff's motion for preliminary injunction, pp. 18–20.) Normally, of course, such consideration of the merits would be heard later, and a preliminary injunction would issue solely on the basis of irreparable injury, the balance of convenience, and the public interest, as discussed in Part I, *supra*. In this case, however, the Court deems it appropriate to proceed immediately to the merits of the [illegible]

The Court does so because the merits have been fully briefed and argued on the motion for preliminary injunction,[4] and because there are no disputed facts.

1. *Jurisdiction.*

This is an action seeking a permanent injunction against the holding of an election to select a collective bargaining representative, upon the ground that the procedures of the National Mediation Board in preparing for the election and in soliciting the will of the majority do not conform to procedures required both by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and by the due process clause of the Fifth Amendment of the Constitution. This Court has jurisdiction under 28 U.S.C. § 1337,[5] since the Railway Labor Act is an act of Congress regulating commerce, *Virginian Ry. Co.* v. *System Fed'n*, 300 U.S. 515, 553–7 (1937), and since 28 U.S.C. § 1337 requires no monetary jurisdictional amount. *Felter* v. *Southern Pac. Co.*, 359 U.S. 326, 329, n. 4 (1959).

[4] Some of the Board's argument-headings reveal the full extent to which the merits were briefed: "The Court is Without Jurisdiction Over the Subject Matter;" "Plaintiff's Contentions are Without Merit;" "Plaintiff Lacks Standing to Maintain This Action;" "Even if Plaintiff Were a Party to The Proceeding, It Would Not Be Entitled to a Hearing as to the Craft or Class;" "Plaintiff's Objections to the Form of Ballot are not Sound;" "The Board's Decision to use the Long Established Craft or Class and the Customary Form of Ballot is not Erroneous." It is true, of course, that all of these arguments were sub-arguments under a main heading to the effect that jurisdiction and the right to relief "are Not Clear" and that it "is Unlikely that Plaintiff Will Prevail Upon the Merits." Nevertheless, as the Board itself has conceded, it was forced to deal directly with those merits by virtue of the fact that the ultimate and the preliminary relief are inextricably tied together.

[5] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *." 28 U.S.C. § 1337.

Such general jurisdiction, however, is not sufficient to dispose of the jurisdictional issue, since in cases involving the Railway Labor Act, jurisdiction to review actions of the unions, employers, or the National Mediation Board depends upon the particular issue upon which review is sought.

On the one hand, courts do not have jurisdiction to review the propriety of the Board's definition of the scope of a "craft or class," *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943), for:

> It has become well settled that in making "craft or class" determinations, the [Board] may regroup, amalgamate, or splinter "historic" bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a "class" for representation in a jurisdictional dispute is unreviewable in the courts. *UNA Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, 111 U.S. App. D.C. 121, 124, 294 F. 2d 905 (1961). *Accord, Air Line Stewards Ass'n* v. *National Mediation Bd.*, 111 U.S. App. D.C. 126, 294 F. 2d 910 (1961), *cert. denied*, 369 U.S. 810 (1962).

Nor do courts have jurisdiction to decide which of two unions seeking to be the collective bargaining representative should have been certified by the Board as the representative of such "craft or class," *General Committee, Bhd. of Locomotive Eng'rs* v. *Missouri R.R.-K.-T. Co.*, 320 U.S. 323 (1943).

> Where there is doubt as to representation and where there are rival jurisdictional claims, those doubts are to be resolved and the claims are to be vindicated or rejected not by the courts but by the administrative and other processes provided by the Act. *Flight Eng'rs' Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745, 747 (2d Cir. 1963).

Nor do courts have jurisdiction to decide whether particular employees should or should not have been declared eligible voters in a representation election. *Decker* v. *Venezolana*, 103 U.S. App. D.C. 301, 258 F. 2d 153 (1958); *WES Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, — U.S. App D.C. —, 314 F. 2d 234 (1962).

On the other hand, courts have taken jurisdiction to review actions of the Board where serious issues of constitutionality or of statutory construction were presented. Thus federal courts have taken jurisdiction to decide whether the Railway Labor Act was within the power of Congress to enact and whether such Act required an employer to negotiate with a collective bargaining representative once such representative had been certified by the Board. *Virginian Ry. Co.* v. *System Fed'n*, 300 U.S. 515 (1957). And the Supreme Court held that there was jurisdiction to decide whether the Act required the union bargaining representative to represent all employees within the class, regardless of race, thereby reversing lower federal courts which had held there was no such jurisdiction. *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). The Court in *Tunstall* specifically distinguished the *Switchmen's Union* case, 323 U.S. at 213, for the reasons set forth in the companion case of *Steele* v. *Louisville & N. R.R. Co.*, 323 U.S. 192, 204–5 (1944). Furthermore, the Court of Appeals has discussed the facts of the Board's procedures before reaching the conclusions that the "investigation" required by the statute, 45 U.S.C. § 152, Ninth, had been held, and that no constitutional question of due process was presented. *WES Chapter* v. *National Mediation Bd.*, *supra*, 314 F. 2d at 237; *UNA Chapter* v. *National Mediation Bd.*, *supra*. And the Court of Appeals has specifically taken jurisdiction to

determine the correctness of a construction of the statute by the Board which limited the statute's geographical scope. *Air Line Dispatchers Ass'n* v. *National Mediation Bd.*, 89 U.S. App. D.C. 24, 189, F. 2d 685 (1951), *cert. denied*, 342 U.S. 849 (1951).

The *Air Line Dispatchers* case, *supra*, is highly important in setting the proper context for a resolution of this difficult question of whether or not this Court has jurisdiction over the particular issue presented here. That case carefully discussed the sweeping language of the *Switchmen's Union* case, *supra*, 320 U.S. at 300-6, which had severely limited the scope of judicial review over the Board's action, and concluded that a fundamental change had been brought about by the enactment, subsequent to *Switchmen's Union*, of the Administrative Procedure Act, 5 U.S.C.A. §§ 1001-11. The Court of Appeals noted that § 10 provides:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. (5 U.S.C.A. § 1009.)

The court went on to say that, although the Administrative Procedure Act was not intended to change existing case law as to particular issues which had previously been held not within judicial cognizance, such broad statements as that in the *Switchmen's Union* case to the effect that in view of the history of the Railway Labor Act a purpose to afford judicial remedy must plainly appear "should now be read in the light of the purpose of the Administrative Procedure Act subsequently enacted." 89 U.S. App.

D.C. at 28. The court went on to quote from a document indicating that purpose:

> Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial. *Ibid.*

The court concluded that if "the nature of the question" was such as to suggest judicial review, then the Administrative Procedure Act would authorize such review. *Ibid.*

In the light of the Administrative Procedure Act, this Court views "the nature of the question" presented here as urgently requiring judicial review. The question involves a serious issue of statutory construction, possibly rising to constitutional dimensions.

The basic question is whether the Railway Labor Act denies to voters certified as eligible to vote in an election held pursuant to 45 U.S.C. § 152, Ninth, for the selection of a collective bargaining representative, the chance to vote for no representation at all. Although the Board's policy is to refuse to certify any representative if a majority of eligible voters fail to *participate* in the election, the Board construes the statute as forbidding a direct vote for no representation. The Board's position as to the required interpretation of the statute is shown in the italicized portions of the following interchange between the Court and the attorney for the Board at the hearing on the present motion:

> The COURT. "Are you willing, on behalf of the Mediation Board, to have marked on the ballot a statement that the failure to vote will have the same effect as if they had voted 'No' and wished not to be represented by a union?"

Mr. LEATHERS. "I don't think I am authorized to make that representation."

The COURT. "If you say that it is the same, why aren't you willing to agree to it?"

Mr. LEATHERS. "I am about to explain this, I think, in this way: *The Mediation Board has taken the position that the language of the statute requires a representative* and that a majority of those—the Supreme Court has held a majority of those voting are authorized to elect that representative. Now the Mediation Board feels that the form of ballot which they have been using over this long period of time, this form of ballot is not something new, it is not something untried."

The COURT. "Whether it is something new or old doesn't help us much. The question is whether these people are being deprived of a right which they ought to have, to express their wishes as to whether they should be represented."

Mr. LEATHERS. "I think the short answer to that is that the Supreme Court has held that the majority of those actually voting are entitled to choose the representative."

The COURT. "They claim they have no right to vote at all."

Mr. LEATHERS. "No, they have a right to vote. *They just don't have a right to vote for no representation.*"

The COURT. "Isn't that in effect giving them no right to vote?"

Mr. LEATHERS. "No, because they can vote for one of the representatives if they wish to."

The COURT. "Suppose they don't want to vote for either? They are denied the right to vote on that issue?"

Mr. LEATHERS. "Yes, that's right. Understand, they are not denied the right to express their views by refraining from voting."

After quoting from the language of the Supreme Court in *Virginian Ry. Co.* v. *System Fed'n, supra,* 300 U.S. at 559, Mr. Leathers went on to state:

> Mr. LEATHERS. "The Supreme Court in that case seems to suggest that the rule here is the same rule as that in any election. In other words, *if you have a chance to elect two Congressmen, there is no chance on the ballot to say I don't want a Congressman at all.* The statute here, [45 U.S.C. § 152. Second] provides for the solution of these disputes by representatives. The Board's function under [45 U.S.C. § 152. Second] is to decide between the two disputants who claim they are representatives. There is nothing in the statute which provides—"
>
> The COURT. "Is there anything in the statute that indicates that a group who do not want to be represented should not also have the right to express themselves?"
>
> Mr. LEATHERS. "I think the Supreme Court has so indicated in the *Virginian* case."

This Court believes that the legal issue thus squarely posed—whether in a vote for a collective bargaining representative of a "craft or class" designated by the Board, the Railway Labor Act requires that eligible voters shall have no right to cast a ballot against any representation at all—is of great importance and should be resolved by the courts. Indeed, the Board's own reliance on the *Virginian* case for the merits of its position shows clearly that the Supreme Court has already assumed jurisdiction over an issue which is closely related to—but not identical with—the one presented here.

I therefore conclude that this Court has jurisdiction to review those actions of the Board which reflect the Board's conclusion that the Railway Labor Act forbids a vote for no collective bargaining representation.

2. Standing.

The Board has raised no issue as to whether the plaintiff's members actually are, as alleged in the complaint, "personal service and clerical employees of United Air Lines." The Board's executive secretary has merely stated, by affidavit, that the cards authorizing the plaintiff to speak for its members were, as of April 22, 1963, being held in the Board's offices, and that:

> The [plaintiff] has stated they have presented a total of approximately 6,400 cards. No attempt has been made by the Board to verify this number or to check the signatures on the cards against the eligible list which has been prepared by the mediator for the reasons which are fully explained in Board's letter of March 27, 1963 * * *. (Thompson affidavit, p. 9.)

These reasons came down to one point:

> [T]he [plaintiff] does not hold itself out as a representative for the purposes of collective bargaining under the Railway Labor Act, and accordingly, the [plaintiff] cannot be considered by the National Mediation Board as a bona fide intervenor * * *. (Exhibit B, letter of E. C. Thompson, March 27, 1963, p. 3.)

Since this decision of the Board depends completely upon the Board's construction of the statute as barring from formal participation any party not seeking to be an actual collective bargaining representative—as the plaintiff herein does not—the Board's argument on standing is merely another way of stating its position on the merits. Since the Board has made no argument that the plaintiff is not what the plaintiff is alleged to be—an association of employees in the "craft or class" in which the election is to be held—the Board must be deemed to have waived any need on the part of plaintiff to prove its own status in fact,

since obviously such factual status, if challenged, would be just as relevant to a motion for preliminary injunction as it would be to the ultimate determination of the merits. The Court therefore concludes that the plaintiff has standing to maintain the action in court as an association composed of employees of United Air Lines who are in the "craft or class" in which the disputed election is scheduled.*

3. *The Ballot.*

The Board has construed the Railway Labor Act as forbidding a vote for no collective bargaining representation. This Court believes that this construction by the Board is contrary to one of the stated purposes of Congress in amending the Railway Labor Act in 1934, is not in harmony with the only language of the Supreme Court on the subject, overlooks the importance of freedom of expression on this issue, and is not required by the language of the statute.

45 U.S.C. § 152 provides, in pertinent part, as follows:

> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
>
> Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither

* The Court, of course, is here indicating no opinion as to whether the plaintiff should have been given "standing" by the Board as a formal "intervenor" in the Board's own proceedings.

party shall in any way interfere with, influence, or coerce the other in its choice of representatives. * * *

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice * * *.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization * * *.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of rep-

resentatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. * * *

* * * * * *

Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the begining of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class * * *.

Several observations must be made about these stautory provisions. The first is that employees have "*the right* to organize and bargain collectively through representatives of their own choosing." Fourth, *supra*. (Emphasis added.) There is no *requirement* that they bargain collectively. Such freedom to bargain collectively or not is reinforced by the provision that no carrier "shall require any person seeking employment to sign any contract or agreement promising *to join or not to join* a labor organization * * *." Fifth, *supra*. (*Emphasis added.*) Only where a carrier and the employers have mutually agreed upon a union shop must an employee agree to

join a labor organization. Eleventh, *supra*. Thus *freedom* of association or non-association is emphasized in the statutory language.

Of course, the statutory scheme does assume that, in most cases, employees *will* bargain collectively. The whole scheme assumes that there are "disputes" between the carrier or carriers on one side, and the employees on the other. Second, *supra*. The statute then establishes machinery for the determination of who among the employees will be the bargaining representative, Ninth, *supra*, and requires that the carrier keep out of such machinery. Third, Fourth, Fifth, *supra*. But if true employer-employee "disputes" do not happen to arise in such an across-the-board fashion, as seems to be the case when there are a variety of different individual agreements between employer and employee negotiated, by the wishes of both parties, on a one-to-one basis, then the assumption behind the statute disappears, and the whole point behind having the collective bargaining representative disappears. The issue in this case is whether employees have a right to vote, in effect, that such employer-employee "disputes" do not happen to exist in their particular category of employment, and whether if the Board decides to hold the "secret ballot" provided in Ninth, *supra*, such employees have a right to indicate their preference on the ballot?

It is not surprising that the statute as such does not answer this question. Congress, in 1934, was concentrating upon erecting machinery which would *force* reluctant employers to deal with the chosen representatives of their employees. *Virginian Ry. Co.* v. *System Fed'n*, 300 U.S. 515, 538–49 (1937). There are strong indications, however, that Congress intended employees to be free *not* to associate as well as to associate. Thus the House Committee on Inter-

to adopt a construction of the statute which would encourage participation in these elections is shown by its subsequent statement that "[t]here is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer." *Ibid.* The Board's interpretation of the statute thus encourages the very non-participation which the Supreme Court sought to discourage.

It must be added that in the *Virginian* case, *supra*, the Supreme Court did not deal with the issue before the Court in the present case. No issue was raised as to the form of ballot, and neither party was arguing that employees should be permitted to vote for no representation. Indeed, as far as this Court knows, the electoral dispute which is the subject of this case is the first to raise this issue in the courts.[1]

The Board argues that since under 45 U.S.C. § 152, Ninth, *supra*, the Board may certify a collective bargaining representative without holding an election at all, then "[*a*] *fortiori*, if the statute does not require an election, it does not require a ballot in any particular form if the Board determines to go ahead with an election." (Board's Memorandum, p. 13.) Obviously, however, such an argument proves too much, since there are some forms of ballot—one, for instance, which left off one of the unions certified to be a party to the dispute—which would be clearly illegal. This Court is merely indicating that *if* the

[1] *Radio Officers' Union* v. *National Mediation Bd.*, 86 U.S. App. D.C. 319, 181 F. 2d 801 (1950) upheld the Board in its refusal to certify a representative on the basis of minority participation. This, indeed, had been the result in the *Virginian* case in the District Court as to the one craft or class in which a majority had refrained from voting. *System Fed'n* v. *Virginian Ry. Co.*, 11 F. Supp. 621, 628 (D. Va. 1935). This part of the lower court's holding was not appealed, and was therefore not before the Supreme Court. 300 U.S. at 559.

Board decides to conduct its "investigation" by means of a "secret ballot," 45 U.S.C. § 152, Ninth, then that ballot must conform to the requirements of the statute.

In order to protect the vitality of these important electoral processes, this Court has concluded that the Railway Labor Act requires that employees be given the chance to vote directly for no collective bargaining representation. The National Labor Relations Board, under a statute whose language also left the issue open, adopted such a policy early in its history. In refusing to strike from the ballot the words "or by neither" in a campaign between two unions, the NLRB explained its position in terms which apply, as well, to the issue now before the Court:

> The Act, however does not require an unwilling majority of employees to bargain through representatives. It merely guarantees and protects that right of a majority if it chooses to exercise it. Yet if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one or other of the nominees. The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives. * * *
>
> It was contended * * * that the privilege of an employee to indicate that he does not desire either of the named unions to represent him, if it must be preserved, could also be expressed by refraining from voting or by casting a blank ballot. In line with other authorities * * * however, we indicated * * * that those not voting would be presumed to acquiesce in the choice of the majority who do vote, and

4. Supplemental Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 973–63

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, PLAINTIFF

vs.

NATIONAL MEDIATION BOARD ET AL., DEFENDANTS

MEMORANDUM

On May 3, 1963, this Court granted a preliminary injunction enjoining the defendant National Mediation Board from conducting any election among the "Clerical, Office, Stores, Fleet and Passenger Service employees" of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation. On the same date, this Court also ordered that the defendant have until May 10, 1963, to show cause why the preliminary injunction above granted should not be made permanent.

On May 10, 1963, the defendant filed a motion to dismiss the complaint, or in the alternative for summary judgment. On the same date, the defendant filed a response to the order to show cause, requesting the Court to reconsider and vacate the preliminary injunction above granted, or to stay the preliminary injunction and allow the Mediation Board to conduct the proposed election, and opposing the entry of a permanent injunction.

In support of its various motions, the defendant has submitted an affidavit of Francis A. O'Neill, Jr., a member of the National Mediation Board. Mr. O'Neill has repeated the Board's position as to the

long-continued use of this form of ballot, and the time and expense involved in the preparation by the Board of a new list of eligible voters. Obviously, neither of these arguments is sufficient to overcome the Court's previous conclusions, stated in its memorandum of May 3, 1963, that the proposed form of ballot is illegal under the Railway Labor Act, 45 U.S.C. § 151 *et seq*, and that plaintiffs, with the balance of convenience in their favor, would be irreparably injured by the holding of the election with an illegal form of ballot.

The only argument of Mr. O'Neill's not already made by the Board, and hence not fully considered by the Court in reaching its conclusion to issue the preliminary injunction, is the following:

> In the opinion of the National Mediation Board any requirement that the ballot used in a representation dispute be changed to provide a space in which the voters can vote for no representation will tend to encourage the parties to a representation dispute to resort to self-help rather than to seek the services of the Board in resolving the representation dispute and will result in strikes and unrest in the industries covered by the Railway Labor Act which would not result were the normal form of ballot used.

Implicit in this argument is the assumption that unions will prefer to strike rather than to ask the National Mediation Board to investigate a representation dispute pursuant to 45 U.S.C. § 152, Ninth, if any election held by the Board in the course of such investigation must be by a ballot on which the voter can express a preference for no collective bargaining representation. Why unions would prefer to strike rather than engage in an election campaign culminating in a ballot on which all alternatives are clearly stated is not clear to the Court. The Board already has a policy of refusing to certify a collective

bargaining representative if a majority of the eligible voters fail to return valid ballots. The Court has merely held that the ascertainment of the number of voters who prefer no collective bargaining representation must, under the Railway Labor Act, be by means of ballots on which such preference can be expressed clearly and unambiguously. Such an unambiguous procedure for ascertaining majority will is no more an invitation to strikes or "self-help" than is the Board's own present policy. In any event, if such "self-help" were to impair the Board's important functions, then it would be for the Congress to take such action as it deemed appropriate to change the Railway Labor Act.

The Board has made the further argument that the issue of whether the Railway Labor Act's provisions for majority determination of representation disputes requires a ballot on which a voter can express a preference against any such representation, is a matter properly left to the expertise of the Board, even though a question of statutory construction is obviously involved. *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), upon which the Board relies for this argument, is not in point. There the dispute concerned which of two methods of financial cost accounting was required by a statute which specified neither, and the Supreme Court held that the Canal Company could determine the issue as it though best, particularly since the President and the Congress had been fully advised of the Canal Company's method of accounting. 356 U.S. at 318–19. "[T]he question is so wide open and at large as to be left at this stage to agency discretion. The matter should be far less cloudy, much more clear for courts to intrude." *Id.* at 319. Here, by contrast with the *Panama Canal Co.* case, the issue of statutory construction goes to the

very center of the complicated mediation procedures outlined at length in the Railway Labor Act, with its clear and uncloudy emphasis upon majority determination of the issue of representation. The form of ballot prescribed by the Board is a clear "mistake of law," and judicial review is thus appropriate. *Id.* at 318.

The Board has also cited to the Court certain language from the recent case of *WES Chapter, Flight Eng'rs' Ass'n* v. *National Mediation Bd.*, —— U.S. App. D.C. ——, 314 F. 2d 234 (1962).[1] The language immediately following that quoted by the Board, however, is more relevant to the issues now before the Court:

> Where courts have taken jurisdiction of such representation disputes the context has strongly indicated either that the Board by refusing to act had obliterated rights granted to employees by Congress or, turning now to a situation arising under the National Labor Relations Act, the Board had acted in excess of its delegated powers and contrary to a statutory provision which is "clear and mandatory." *Leedom* v. *Kyne*, 358 U.S. 184 (1958). When this occurs the courts "cannot lightly infer that Congress does not intend judicial protection of rights it

[1] "The need for a large degree of conclusiveness in the settlement of labor disputes over the question of employee representation in the transportation industry was met by Congress in the Railway Labor Act. Responsibility was given to a board with special competence, in the effort to maintain enough harmony to prevent interruption of service. Congress sought to preclude litigation in the courts over what the Supreme Court has called an 'explosive problem.' *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 303 (1943). The Court said Congress had taken 'great pains' to protect the Mediation Board in its handling of the problem. Consequently the courts have seldom intruded. [Citation of cases omitted.]" 314 F. 2d at 236.

confers against agency action taken in excess of delegated powers." *Id.* at 190. *WES Chapter, supra*, 314 F. 2d at 236.

An election based upon use of the Board's present ballot would obliterate the right to vote for no collective bargaining representation, and would thus be contrary to the clear requirements of the Railway Labor Act's stated policy of majority determination.

Since the above points constitute the only issues raised by the Board in response to the Court's order to show cause why the preliminary injunction should not be made permanent, and since the Board in response to said order to show cause has raised no disputed issue of fact on which a trial would be necessary, the Court will deny the Board's motion to dismiss or in the alternative for summary judgment, and will issue a permanent injunction for the reasons set forth in this memorandum and in the memorandum of May 3, 1963.[2]

This memorandum shall be considered as specific findings of fact and conclusions of law, supplemental to the findings of fact, conclusions of law, and memorandum of May 3, 1963, which findings, conclusions, and memorandum of May 3, 1963, are hereby readopted by the Court.

LUTHER W. YOUNGDAHL,
Judge.

MAY 29, 1963.

[2] In reaching this conclusion, the positions advanced by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, which union has been permitted to intervene in this action pursuant to Rule 24(b), Fed. R. Civ. P, have been fully considered but have not been separately stated since they repeat, in summary form, issues fully argued by the Board and disposed of by the Court in its memorandum of May 3, 1963.

APPENDIX B

Section 2 of the Railway Labor Act, as amended in 1934, 44 Stat. 577, 45 U.S.C. 151a–152, provides in part:

> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.
>
> Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.
>
> Fourth.[1] Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the

[1] Amended by Public Law 914, 81st Cong., 64 Stat. 1238. (See sec. 2 eleventh.)

right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representa-

tive of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

The Railway Labor Executives' Association submits this brief as *amicus curiae* in support of the petition for certiorari filed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and

Station Employes. The consent of all parties to the case has been obtained and such consents have been filed with the Clerk of the Court.

INTEREST OF THE ASSOCIATION

The Railway Labor Executives' Association is a voluntary unincorporated Association located in Washington, D. C., with which are affiliated twenty-three standard national and international railroad labor organizations that are the duly authorized representatives under the Railway Labor Act of the bulk of the nation's rail employees. In addition, some of these organizations are the duly authorized representatives under the Railway Labor Act of employees of various air carriers, including employees of United Air Lines, Inc. The names of these individual organizations are:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers

International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers

This Court has recognized the Association as the proper party to appear and speak for these Affiliated organizations and the member-employees. *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373 (1942); *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 (1950); *American Trucking Associations, Inc., et al.* v. *United States,* 355 U.S. 141 (1957).

The questions presented by the appeal in this case are of the utmost importance to the Railway Labor Executives' Association, the individual organizations of which it is composed, and the thousands of air line and railroad employees who have chosen such organizations as their collective bargaining representatives in labor relations arising under the Railway Labor Act.

This case arose out of an application filed with the National Mediation Board by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes invoking the services of the National Mediation Board under the provisions of Section 2, Ninth of the Act (45 U.S.C.A., Section 152, Ninth) to investigate and resolve a representation dispute among clerical employees (and other employees related by class or craft) of United Air Lines (United).

(R. 35.)[1] Respondent, Association for the Benefit of Non-Contract Employees (ABNE) sought to intervene in the representation dispute before the Board (Case No. R-3590) and at the same time requested the Board to (a) defer any election in the dispute until the Board had re-determined the composition of the craft or class of employees involved, (b) make a re-determination of the composition of the craft or class of employees involved in the dispute so as to create three separate crafts or classes, and (c) prepare and use in any representation election conducted in the dispute a form of ballot providing on its face a place for employees to vote affirmatively that there be no bargaining agent elected to represent their craft or class. (R. 11-14.) The Association also requested the Board to hold a hearing bearing on the issue of a re-determination of the composition of the craft or class of employees involved if it were unable to make such a re-determination without such additional facts (R. 12). In seeking a re-determination of the composition of the craft or class involved, the Association was asking the Board to review and change a previous formal determination made by the Board after hearings in Case No. R-1706, et al., dated January 31, 1947 (R. 57). While this request was pending before the Board, the Association informed the Board as follows with respect to its organization and objectives: (R. 111)

> "Perhaps to answer some unasked questions, these points should be made clear:
>
> 1. We are not seeking recognition as a bargaining agent; we do not want our name on the ballot.

[1] Reference is to pages of consolidated joint appendix before Court of Appeals, copies of which have been filed with the Court by petitioner.

2. We have no intention of becoming a Company union.

3. We are not sanctioned, recognized, or assisted in any way by United Airlines management.

4. Our Association will be dissolved after such time as it has served its purpose."

The Board denied the requests of the Association on the grounds that (1) the petition to intervene in the representation dispute would not conform to the provisions of Rule 1206.5 of the Board's Rules since the Association did not purport to represent the employees involved for the purposes of collective bargaining under the Railway Labor Act and did not want its name placed upon the ballot in any representation election, and (2) it was clear that the Association did not hold itself out as a representative for the purposes of collective bargaining under the Railway Labor Act and could not be considered by the Board as a bona fide participant in Case No. R-3590. The Board's letter of denial to the Association read in pertinent part as follows: (R. 17)

> "Section 2, Ninth, of the Railway Labor Act provides for certain actions by the National Mediation Board to resolve disputes among a carrier's employees 'as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act. . . .' This language implies contests between 'parties' for the right to represent the employees involved in the dispute. By your own statements, you had disavowed any intention of the ABNE to bargain collectively for the employees concerned. Under the provisions of the Railway Labor Act, therefore, the Board is unable to recognize the Association as a proper 'party in interest' in Case No. R-3590."

The Board also denied a subsequent request of the Association for reconsideration. (R. 111.)

Thereafter, ABNE brought suit in the District Court to restrain the Mediation Board from conducting any election in the craft or class of United employees involved unless the Board should (a) conduct a hearing relative to the appropriateness of the craft or class; (b) afford ABNE status as a party in interest at said hearing; and (c) offer a ballot upon which voting employees can vote for or against representation (R. 9). The District Court granted a preliminary injunction against the Board, which read as follows: (R. 132)

> "ORDERED That the plaintiff's motion for a preliminary injunction enjoining the defendant from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., [in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation shall be and the same is hereby granted,] and it is
>
> "FURTHER ORDERED That the defendant shall have one week from today's date to show cause why the preliminary injunction above granted shall not be made permanent, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 *et seq.* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

Thereafter, this injunction was made permanent (R. 170).

The decision of the Court of Appeals affirmed the District Court's order by a 2-1 vote. The majority did not write a separate opinion but simply adopted the District Court's views.[2] The impact of this decision upon the administration of the Railway Labor Act and upon the Railway Labor Executives' Association, its constituent organizations, and the employees it represents is such as to clearly give these parties a substantial interest in supporting a review of such decision by this Court. The recognition of a right by any group which disavows an intention to represent employees for the purposes of collective bargaining under the Railway Labor Act to intervene in representation disputes before the Mediation Board and to be accorded a hearing on the composition of the craft or class of employees involved opens the doors wide to consistent improper interference in labor matters among railroads and air carriers, protracted delay in the processing of applications for the investigation of representation disputes and would, as the Mediation Board found, thwart the purposes of the Railway Labor Act. The decision respecting the form of ballot which the Mediation Board must use if it decides to conduct a representation election opens the way for continuous litigation concerning the manner in which the Mediation Board performs its duties under Section 2, Ninth with consequent injury to the rights of employees seeking legitimate representation.

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[2] United Air Lines also sought but was denied the right to intervene in the Board proceeding to urge similar procedures. United's subsequent appeal (No. 17,777) from a District Court judgment dismissing its complaint was consolidated on appeal with the instant case and the District Court's judgment affirmed on the ground that United, lacked requisite standing to initiate an action to review the Board's order.

REASONS FOR GRANTING WRIT

1. The decision and judgment of the Court of Appeals is in direct conflict with this Court's decisions in *Switchmen's Union of North America, et al.* v. *National Mediation Board, et al.*, 320 U.S. 297 (1943), and *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, et al.* v. *United Transport Service Employees of America, et al.*, 320 U.S. 715 (1943). In those cases, this Court held that Federal courts did not have jurisdiction to review actions of the National Mediation Board in the exercise of its functions under Section 2, Ninth of the Railway Labor Act. In the *Switchmen's Union* case, this Court averted to the "highly controversial" nature of representation disputes, the great pains which Congress took to protect the Mediation Board "in its handling of an explosive problem" and concluded that "we cannot help but believe that if Congress desired to implicate the Federal judiciary and to place upon the Federal courts the burden of having the final say *on any aspect of the problem*, it would have made its desire plain." (320 U.S. at 302, 303.)[3]

This Court also noted that it is the clear intent of the statute that there was to be no dragging out of representation controversies into other tribunals of law (page 305). The decision below clearly implicates the federal judiciary in representation disputes, places upon the federal courts the burden of having the final say on the manner in which the Board performs its functions under Section 2, Ninth and interminably drags out representation controversies into other tri-

[3] Emphasis added.

bunals of law—all in direct contradistinction of this Court's views in the *Switchmen's Union* case. The accuracy of this Court's reasoning in the *Switchmen's Union* case is clearly borne out by the fact that the application of the Brotherhood invoking the services of the Board was filed on or about August 24, 1962 (R. 35, 36), and, although Section 2, Ninth provides that "within 30 days after the receipt of the invocation of its services" the Board shall designate the authorized representatives of the employees involved in the dispute, almost two years have gone by and the representation controversy is still in litigation. It is difficult to envisage a more direct thwarting of the basic purposes of Section 2, Ninth, or of the Railway Labor Act.

2. The decision and judgment of the Court of Appeals is directly contrary to a long line of decisions of other Federal courts, including the Court below, which followed the *Switchmen's Union* decision. *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R. Co.*, 201 F. 2d 36 (4th Cir., 1953); *Rose, et al.* v. *Brotherhood of Railway and Steamship Clerks*, 181 F. 2d 944 (4th Cir., 1950); *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 114 U.S. App. D.C. 229, 314 F. 2d 234 (D.C. Cir., 1962); *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 111 U.S. App. D.C. 121, 294 F. 2d 905 (D.C. Cir., 1961); *Airline Stewards and Stewardesses Association* v. *National Medation Board et al.*, 111 U.S. App. D.C. 126, 294 F. 2d 911 (D.C. Cir., 1961), *cert. den.* 369 U.S. 810; *Decker, et al.* v. *Linea Aeropostal Venezolana, et al.*, 103 U.S. App. D.C. 301,

258 F. 2d 153 (D.C. Cir., 1958);[4] *Airline Dispatchers Association, et al.* v. *National Mediation Board, et al.*, 89 U.S. App. D.C. 24, 189 F. 2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849; *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 85 U.S. App. D.C. 352, 179 F. 2d 446 (D.C. Cir., 1949); *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 79 U.S. App. D.C. 15, 141 F. 2d 724 (D.C. Cir., 1944); *National Federation of Railway Workers, et al.* v. *National Mediation Board, et al.*, 79 U.S. App. D.C. 16, 141 F. 2d 725 (D.C. Cir., 1944).

In addition, the decision of the Court of Appeals is in direct conflict with a recent decision reached by the United States District Court for the Northern District of Ohio, Eastern Division, in *Droggos, et al.* v. *National Mediation Board, et al.*, 227 F. Supp. 61 (1963) which refused to accept the decision of the District Court for the District of Columbia. The *Droggos* case involved an action under the Railway Labor Act to restrain the Mediation Board from conducting a representation election among the employees of Lake Central Airlines unless it used a ballot permitting an affirmative vote for "No Union". The United States District Court for the Northern District of Ohio held that it did not have jurisdiction to review the action of the Mediation Board and to grant the requested relief. In reaching this decision, that Court had before

[4] In the *Decker* case, paragraph 8 of the complaint in the District Court raised the identical question here involved of the form of ballot used by the National Mediation Board in representation elections and the appeal from the District Court's decision dismissing the complaint specifically raised the issue. The Court of Appeals held that under such circumstances, the prohibition in the *Switchmen's Union* case is applicable (258 F. 2d at 154).

it the decision of the United States District Court for the District of Columbia Circuit in the present case but declined to follow that decision on the grounds that it was contrary to this Court's holdings in the *Switchmen's Union* case. On this point, the Ohio District spoke as follows: (page 62)

> "Despite a contrary holding in Association for the Benefit of Non-contract Employees v. National Mediation Board, 218 F. Supp. 114, D.C., (1963), it is my view that no constitutional right, nor any fundamental right has been denied to the plaintiffs. I find that the Board, in selecting the form of ballot, was exercising the discretion committed to it by the statute to establish the rules to govern the election. This discretionary action is not reviewable under Switchmen's Union of North America v. National Mediation Board, supra, General Committee of Adjustment of Brotherhood of Locomotive Engineers etc. v. Missouri-Kansas-Texas Railroad Co., 320 U.S. 323, 64 S. Ct. 146, 88 L. Ed. 76 (1943), and Rose v. Brotherhood of Railway and Steamship Clerks, supra. The statute contemplated affirmative action by the Board rather than negative action which would be against representation. If the Board used a method of obtaining the choice or desires of the employees concerned which bore a reasonable relation to the discretionary power vested in it, I think the court is not authorized to interfere."

3. The decision and judgment of the Court of Appeals erroneously decides an important question of Federal law in the administration of the Railway Labor Act.

At the time the present controversy arose, the National Mediation Board had behind it a record of more than 30 years in the handling of representation dis-

putes pursuant to Section 2, Ninth of the Railway Labor Act. During this period the Board had used ballots which did not provide a place thereon for an employee to affirmatively vote "No Union". The Board had pursued such a policy and it denied the request in the present dispute to change that policy because, in its view, the inclusion of a box upon a ballot to affirmatively vote against representation "would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees." (R. 87.) This consistent policy of the Board in the administration of its duties under Section 2, Ninth has been formally published (R. 161) and yet Congress did not amend the statute in any way. In spite of this long prevailing practice and the well established precedents against judicial review of Mediation Board actions under Section 2, Ninth the Court of Appeals reversed the Board's action without even an opinion setting forth the majority's reasons for such action. The majority simply adopts the opinion of the District Court.

A review of the District Court's opinion shows that it was based on that Court's interpretation of the decision in *Airline Dispatchers Association* v. *National Mediation Board,* 189 F. 2d 685 (1951), *cert. den.* 342 U.S. 849, and the application of that decision to the facts in this case. The decision of the Court of Appeals in the *Dispatchers* case permitted a judicial determination of the question of whether the Railway Labor Act had extra territorial application so as to permit the National Mediation Board to certify a collective bargaining representative for employees of domestic air carriers permanently based outside of this

country. Thus, the isscue presented was not the manner in which the Mediation Board had performed its duties under Section 2, Ninth of the Railway Labor Act, but whether or not the Board had any power to act at all under that Section. The Court of Appeals in the *Dispatchers* case clearly recognized the distinction between judicial review of the question of statutory power and review of Board decisions relating to the manner in which the Board performs its functions in cases where it admittedly has authority to act. Thus, the Court of Appeals referred to the long line of cases holding that there was no judicial review of the manner in which the Board performs its duties under Section 2, Ninth and then spoke as follows: (189 F. 2d 687-688)

> "In each of these cases the Board had chosen between alternate methods of settling a dispute over representation under Section 2, Ninth, of the Act. The question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner. The case now before us is quite different. Here there has been a refusal to take any action to resolve the dispute, upon the view that Congress has not extended the powers of the Board to an employer and its employees geographically situated as are these disputants; that is, outside the continental United States and its territories. This in no sense is Board action within the framework of Section 2, Ninth, or, indeed, within any other of the provisions of the Act for administrative resolution of industrial-labor disputes. This is a different 'type of problem' (320 U.S. at page 301, 64 S. Ct. at page 97, 88 L. Ed. 61)."

The complaint in the present case clearly did not present any question of the statutory power of the

Board to act and should have been dismissed under the *Dispatcher* decision. It sought review only of the Mediation Board's manner of investigating a representation dispute over which the Board admittedly has jurisdiction, under Section 2, Ninth.

First: the complaint raised questions as to the refusal of the Mediation Board to conduct hearings at the request of the ABNE at which ABNE would be a party to redetermine the compostion of the craft or class involved. The Board exercised its discretion not to reconsider the composition of the craft or class which it had previously established. (R. 14, 26.) The District Court overturned this Board action and directed the Board to reconsider its refusal to reopen the craft or class question. (R. 170.) This situation presents a classic example of judicial interference with the manner in which the Board investigates and determines a representation dispute under Section 2, Ninth.

Second: the complaint raised questions as to the refusal of the Mediation Board at the request of ABNE to abandon the type of ballot used by the Mediation Board for more than thirty years in some 3400 representation elections and substitute a form of ballot requested by the Association which would contain a box for voting "no representation". (R. 8, 161.) The District Court ordered the Board to use such a ballot. Here again this constituted clear judicial interference with a determination by the Mediation Board as to the manner in which it should investigate and determine representation disputes. Section 2, Ninth does not prescribe any procedure for the Board to follow in determining such a dispute. The Board may choose any procedure which in its judgment is best suited to performance of its duties in the particular dispute.

It is not required to conduct a representation election. *Brotherhood of Railway and Steamship Clerks* v. *Virginian Railway Company, et al.*, 125 F. 2d 853 (4th Cir., 1942). In that case, the Fourth Circuit stated: (page 857)

> "Whether a secret election rather than a checking of authorization cards against company records is a more desirable method of determining the bargaining representative of employees in any particular case, is a matter which the law has confided to the discretion of the Mediation Board and not to the courts."

It would seem clear that if the Board is not required to conduct a representation election as a part of its investigation of a representation dispute, it then has discretion as to the form of ballot used in cases where it does decide to use this procedure. However, the District Court held that if the Mediation Board does conduct a representation election it must conform to the requirements of the statute. What requirements? There are none. If they can be established by judicial order, then so can similar requirements be established for any other actions taken by the Board under Section 2, Ninth and the Congressional intent to leave the administration of this statutory provision to the Board is destroyed. In its place there is established judicial concepts of what is appropriate in any given instance.

The controversy obviously lacked equitable considerations justifying judicial intervention. ABNE claimed representation of, or the authority to speak on behalf of, a majority of the employees involved. It was apparent to it that if such majority did not participate in the election, no bargaining agent would be

certified, thus achieving its objective. Respondent in correspondence to the Board obviously understood that the casting of "invalid" (blank or otherwise) ballots, or the failure of a majority to cast valid ballots (or any ballots at all) would result in no certification. Such action if undertaken by its members, respondent said, did not "appear" to it "to faithfully reflect the democratic process." (R. 109) Consideration of sound equitable principles might well have persuaded the lower court to refrain from interference with administrative procedures used by the Board to resolve in excess of 3400 representation disputes, simply to require conduct in accord with what respondent conceived to be a desirable or more "democratic" procedure.. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 560 (1937). Judicial intervention by the lower court was unnecessary, ill-advised, and erroneous, and the impact of its decision if unchecked will reverse progress in the prompt and orderly settlement of labor relations disputes to a degree far over-shadowing the advantages that may be realized by a procedurally-inspired group of employees otherwise capable of self-help.

CONCLUSION

For the foregoing reasons, the petition of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes for a writ of certiorari should be granted.

Respectfully submitted,

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June 1, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 139

UNITED AIR LINES, INC., PETITIONER

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Believing that the questions presented are important, we do not oppose the petition for a writ of certiorari filed by United Air Lines, seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in Case No. 17,777, decided on March 12, 1964.

That case involved a suit by United to enjoin the respondents (the National Mediation Board and its officers) from holding a representation election among certain of United's employees. The respondents had

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earlier directed that the election be held in discharge of the Board's duty under section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth, to certify the collective bargaining representative desired by the majority of United's employees in the craft or crafts involved.

On the same day that the court of appeals decided Case No. 17,777, and in the same opinion, it also decided two additional cases consolidated with No. 17,777. The two additional cases (No. 18,068 and No. 18,072, in the court of appeals) involved a suit by an association of United's employees to enjoin the holding of the same representation election. All three cases were concerned with the same election order of the National Mediation Board (Pet. App. iv).

In Nos. 18,068 and 18,072, appeals by the National Mediation Board and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, respectively, from an order of the district court enjoining the Board from holding an election "in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation" (Pet. App. v) resulted in an affirmance of the injunction (Pet. App. vi). In No. 17,777, United's appeal from the district court's dismissal of its action for an injunction (in which the court of appeals assumed that the dismissal was based on the carrier's lack of standing to challenge the Board's action (Pet. App. v)), the court

below affirmed on the ground that its decision in the other two cases "affords the relief concerning the form of the ballot which United sought" (Pet. App. v–vi).

In addition to the present petition by United, the Brotherhood of Railway and Steamship Clerks has filed a petition for a writ of certiorari to review the decision of the court of appeals in No. 18,072 (No. 138, this Term). The Solicitor General, on or before August 10, 1964, will file a petition for a writ of certiorari to review the court's decision in No. 18,068. Taken together, the cases present issues involving, *inter alia:* (1) The extent of district court jurisdiction to review certification proceedings of the National Mediation Board, compare *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297; (2) Whether the form of ballot regularly used by the National Mediation Board is violative of the Railway Labor Act; (3) Whether a carrier has standing to challenge the form of ballot to be used by the Board in a representation election among a group of its employees; (4) Whether the Board was required to grant a hearing on the question of the appropriate craft, at either the carrier's request or the request of an association of the employees involved, where the association did not seek to represent those employees for collective bargaining purposes.

These are all questions of importance in the administration of section 2, Ninth of the Railway Labor Act. The issues with respect to the type of ballot used by

the Board are of particular concern. Until they are resolved, the validity of other representation elections being conducted by the Board is open to question. Accordingly, we believe that the writs should be granted in all three cases.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JULY 1964.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

Nos. 369 and 138

NATIONAL MEDIATION BOARD, et al., *Petitioners,* vs. ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent.*	No. 369
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Petitioner,* vs. ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent.*	No. 138

COMBINED BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The respondent, Association for the Benefit of Non-Contract Employees, submits herewith its combined

brief in opposition to the Petition of the National Mediation Board for Writ of Certiorari, No. 369, and Petition of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, No. 138, for Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered March 12, 1964. The actions were numbered 18068 and 18072 in the court below.

OPINIONS BELOW

The opinions of the District Court are reported at 218 F Supp 114 and are set forth in Appendix A, pages 23 to 58 of the Petition for Writ of Certiorari of the National Mediation Board on file herein. The opinion of the Court of Appeals is reported at 330 F 2d 853 and is set forth in Appendix A, pages 13 to 22, of the Petition for Writ of Certiorari of the National Mediation Board on file herein.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1964. The Petition for Writ of Certiorari was filed by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees in Case No. 138, June 1, 1964, and in Case No. 369 by the National Mediation Board August 10, 1964. Jurisdiction of this Court is sought to be invoked under 28 USC, Section 1254.1.

QUESTIONS PRESENTED

1. The National Mediation Board proposed to use in a representation election a ballot form which did not provide on it a space in which an eligible employee could indicate his desire to cast a valid vote not to be represented by a union. The questions presented are:

(a) Does this form of ballot violate the provisions of the Railway Labor Act by infringing upon rights given to the respondent's members by Congress?

(b) Does this form of ballot violate the provisions of the Railway Labor Act that the majority of the employees in a craft or class has the right to select the representative for the craft or class?

(c) Did the National Mediation Board violate the respondent's right to due process under the Fifth Amendment to the Constitution by depriving members of the right to freely determine representation? and,

(d) Are the actions of the National Mediation Board subject to review by the Federal Judiciary for the acts referred to in questions (a), (b), (c) above in the light of the provisions of the Railway Labor Act and the provisions of the Administrative Procedure Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in the Due Process clause of the Fifth Amendment to the United States Constitution. The statutes involved are Sections 2nd, 4th, and 9th of the Railway Labor Act, as amended, 44 Stat 577, 45 USC 151a-152. These sections are set forth in Appendix B, pages 59 to 61 of the Petition of the National Mediation Board.

STATEMENT OF FACTS

The Association for the Benefit of Non-Contract Employees, the plaintiff in the District Court, the appellee in the Court of Appeals, and the respondent here, is a group of some 6,400 employees of United Air Lines, organized and incorporated under the name Association for the Benefit of Non-Contract Employees. The purpose for which the organization was formed was to seek a hearing before the National Mediation Board on a craft or class delineation, and to request a change in a proposed ballot. The craft or class contains over 12,700 ground employees of United Air Lines, of numerous occupations from ticket agents, public contact personnel, baggage handlers and aircraft cleaners (R 62, 130).[1] The request for a hearing sought National Mediation Board review of an older decision made in 1947 and that the National Mediation Board provide a form of ballot upon which eligible employees could cast a valid ballot for no representation by a union.

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[1]References are to the printed joint appendix in the Court of Appeals Record.

In August of 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees filed an application with the Board for an investigation of an alleged representation dispute among certain employees of the class or craft. The Board docketed the matter as case R-3590 and checked a number of authorization cards furnished by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees from employees in the class or craft in support of its application (R 37); the Board determined that a dispute existed among two unions: The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the International Association of Machinists. In December, 1962, the Board ordered an election to determine the bargaining agent of the craft or class and proposed for use in said election a form of ballot which provided on its face a space wherein an eligible employee could vote for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a space for the International Association of Machinists, and a space wherein the employee could write in the name of any organization or individual he wished to represent him (R 45, 114 to 118 and 127). No space was provided for a "no representation" vote.

The craft or class concerned is defined by the Board as "Clerical, office, freight and passenger service employees". It was established in 1947 in Case R-1706 by the Board (Volume 1, Determinations of Craft or Class of the National Mediation Board (1947) (R 15, 16).

The craft or class is divided into three principal groups: (1) Public contact personnel such as ticket representatives, passenger agents and reservation clerks, who number about 5,100; (2) Office and clerical help, being stenographers, clerks, office machine operators, electronic computer operators and other allied occupations who number about 4,500; and (3) Ramps and stores personnel who carry out such functions as baggage handling, storeroom work, plane cleaning and janitorial work. This group numbers about 3,000 employees (R 5). The Association for the Benefit of Non-Contract Employees submitted authorization cards to the National Mediation Board signed by approximately 6,400 of the employees of this craft or class (R 44, 102). The cards authorized the Association for the Benefit of Non-Contract Employees to represent the employees before the Board. The Board made no attempt to verify the cards nor to check the cards against the list of eligible employees (R 42). Respondent petitioned the National Mediation Board to intervene in the representation dispute February 14, 1963, and on February 25, 1963, informed the Board that respondent would not seek recognition as a bargaining agent; that they would not seek a place on the ballot; and that they were acting independently of, without the sanction, assistance or recognition of United Air Lines (R 102, 106-111).

On March 27, 1963, the Board ruled that the plaintiff was not a proper party in interest in the dispute and dismissed the petition wherein respondent asked for a reconsideration of the class or craft grouping.

with or without a public hearing, and a change in the form of ballot to permit employee voters to cast a valid vote for no union representation (R 14-17, 44). On April 5, 1963, respondent requested the Board to reconsider its denial, and on April 12, 1963, the Board denied respondent's request for reconsideration (R 45, 111). On April 13, 1963, respondent filed an action in the District Court for the District of Columbia seeking to enjoin the Board from holding the election which had been scheduled for the 22nd of April, 1963, asking that the Board grant a hearing on the class or craft question and to provide a ballot form upon which employee voters could indicate their preference for no bargaining representation (R 4).

On April 18, 1963, on respondent's motion, the District Court (Hart, J.) entered a Temporary Restraining Order staying the election scheduled. The motion was opposed by the National Mediation Board by affidavits and oral argument. After an extension of the Restraining Order, the case came before the District Court (Youngdahl, J.) on respondent's Motion for Preliminary Injunction. The motion was opposed by the Board, again, on affidavits and oral argument. Respondent's motion was granted and a Preliminary Injunction was issued on May 3, 1963.

In granting the Preliminary Injunction the court filed a Memorandum, Findings of Fact and Conclusions of Law (R 128-133). Contemporaneously with the granting of the Preliminary Injunction, the Court issued an Order to Show Cause to the Board why the Injunction should not be made permanent (R 132).

Thereafter, the Board filed its response to the Order to Show Cause together with a Motion to Dismiss the Complaint, or in the alternative, for summary judgment. The motion was supported by affidavit.

On May 29, 1963, Judge Youngdahl denied the Board's motion and entered its order for Permanent Injunction supported by an opinion (R 166, 170). The injunction ordered the Board to refrain from conducting any election among United Air Line's employees in the craft or class concerned in which the ballot form used would not permit a voting employee to cast a valid vote against representation. It also remanded to the Board respondent's request that the Board conduct a hearing on the question of the appropriateness of the class or craft, at which hearing the respondent could be heard as a party in interest, for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 USC, Section 151, et seq. gave employees the right to a ballot on which they could express a preference for no collective bargaining representation (R 170-171). The opinion of the District Court is reported in 218 F Supp 114.

Appeals from the District Court's decisions were filed by the NMB (No. 18068) and by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (No. 18072); which had intervened in the action. An appeal was also taken in Case No. 17777, which involved a complaint filed by the carrier, United Air Lines, wherein the carrier sought a hearing on the craft or class question and

standing at said hearing and likewise complained as to the form of the ballot. The three appeals were consolidated.

The Court of Appeals in a per curiam decision (Miller and Bastian, J. J. (Wright, J. dissented)), affirmed the decisions in Numbers 18068 and 18072 supporting the Permanent Injunction granted to the respondent herein (Appendix A, pages 13 to 22 of National Mediation Board Petition for Writ of Certiorari).

The court also affirmed the decision in No. 17777 dismissing the United Air Lines suit.

REASONS FOR DENYING THE WRIT

The decision below should be permitted to stand. There is no conflict among the Courts of Appeal, and the decision does not present any issue of an importance warranting Supreme Court review.

The decision of the District Court which was affirmed on appeal determined as a matter of statutory construction of the Railway Labor Act that the National Mediation Board was required to provide in its election a ballot form on which voters would indicate their preference for no representation. The Board argues that this court action is an unlawful interference by the judiciary of Board function.

While there is no question that judicial review of the National Mediation Board action in the exercise of its administrative functions under the Railway

Labor Act has been precluded in certain areas, these areas concern themselves with the Board's "expertise" or judgment concerning the technical matters which come before it. Examples of these are: the definition and scope of a "craft or class" (*Switchmen's Union v. National Mediation Board,* 320 US 297 (1943).) The determination of a bargaining representative as between two contending unions (General Committee) and the determination of eligibility of voters (*Decker v. Venezolana,* 103 US App DC 301, 258 F (2) 153 (1958), *WES Chapter v. National Mediation Board,* 114 App DC 229, 314 F (2) 234 (1962).)

The courts, however, have routinely taken jurisdiction in National Mediation Board cases wherein questions of statutory authority or constitutional guarantees were involved. Such a case involved the requirement of negotiation by an employer with a representative, after the Board has designated such representative (*Virginian Ry v. System Federation,* 300 US 515 (1937).) Whether the Act required that the representative represent all members of the craft or class regardless of race (*Tunstall v. Brotherhood of Locomotive Firemen,* 323 US 210 (1944).) Whether or not the Board's procedures in a given case fulfilled the requirements of an "investigation" as defined by the Act (*WES Chapter v. National Mediation Board,* supra, *UNA Chapter v. National Mediation Board,* 294 F (2) 905, cert. denied 368 US 956); and a review of the Board's construction of the Railway Labor Act with respect to geographical scope. (*Airline Dispatchers Association v. National Media-*

tion Board, 89 US App DC 24, 189 F (2) 685, cert. denied 342 US 841.)[2]

The judicial action taken in this case is within the purview of the cases in which the courts have routinely taken jurisdiction. The National Mediation Board action was in excess of its statutory authority and was an infringement on the constitutional rights of the employees under the Due Process Clause of the Constitution.[3]

The right to judicial action in this case further relies on the provisions of the Administrative Procedure Act which supersedes the earlier cases, and which was applied in a case involving a National Mediation Board act in the *Airline Dispatcher's* case, supra.

The National Mediation Board to justify its action takes two inconsistent positions. First, the Board contends that the Railway Labor Act delivers to it, a "mandate" to ensure, by its procedures that employees under its jurisdiction are provided with *some* representation. This interpretation of the Act, admittedly consisting solely of the Agency's own analysis (which, parenthetically, is subject to grave question

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[2]The last case noted (*Airline Dispatchers*, supra) is of particular importance in that it reviewed the *Switchmen's* case, supra, and noted that under the provisions of the Administrative Procedure Act, 5 USCA § 1001-11, the broad statements of the earlier case must be re-examined. Concluding that if the "nature of the question" was such as to suggest judicial review then the Administrative Procedure Act would authorize such review.

[3]It should be noted that in the earlier cases such as the *Switchmen's* case, supra, the court's right to intervene on constitutional grounds was specifically excepted from the decisions.

in the light of the legislative hearings and reports on enactment of the bill. Respondent's Brief on Appeal, pages 28-30). To effect this agency determination of statutory intent, the Board refuses to provide a space for a no union representation vote on its ballot and refuses to explain its election procedures on the ballot or its accompanying material. In justification of this procedure the Board in its brief refers to a technical pamphlet published by it in 1957, and to a letter mailed to the airline carrier during the dispute. (National Mediation Board Petition for Writ of Certiorari, page 4).

Presented independently, this argument states the Board's position and provides a clear avenue of action with respect to those employees under its jurisdiction.

At this point, however, we encounter the Board's problem, which rises out of the Act, and which produces the Board's second, and totally inconsistent position. The Act provides, and the Board has admitted, throughout these proceedings, that a "majority" of the employees in the "craft or class" concerned shall determine who the representative of that "craft or class" shall be.[4]

The Board has thus created a dilemma. While admitting the right of employees to refuse to designate a representative by failing to provide a vote of the ma-

[4]In conducting an election, if a majority of the eligible voters in the "craft or class" concerned, fail to vote for a given representative, the Board will not designate a bargaining representative (R 46, 98).

jority, the Board attempts to confuse and misdirect the employee by refusing to permit him a fair and unequivocal ballot form on which he can exercise this right.

The agency admitting a right in the employees under its jurisdiction attempts to subvert that right by covert means.

Prior to entry of the injunction, the District Court, in an attempt to clarify the situation and perhaps alleviate the difficulty, queried counsel for the Board about the possibility of placing some explanatory material on the ballot so that employees might be apprised of the manner in which the Board conducted its elections and the effect of a refusal to vote. The position of the Board was stated that no such assistance would be given the voter, the Board's intention being to ensure the election of *some* representation (Respondent's Brief on Appeal, pages 21, 22).

In its petition, the Board's position, the validity of which is studiously avoided by the Solicitor General, is supported principally by a reference to administrative interpretation and long time acquiescence. These reasons are of scant value in justifying the action of an agency acting for the United States government in a manner which, fairly stated, is deliberately failing to effectively inform the large number of citizens with which the agency deals, as to the rules governing its elections. Indeed, going further, in providing a ballot form which will encourage a misunderstanding by the citizen of his rights in Board elections.

In view of the Board's admission and acceptance of the Act's directive with respect to an employee-voter's right to refuse union representation, the Board's action in failing to provide for the effective exercise of that right, must be said to be outside the Act, and in excess of the Board's delegated authority.

The practice and effect of the Board's action must also be said to be in violation of the employee's right to due process under the Fifth Amendment as it deprives those employees of a substantial right granted to them by Congress without hearing or compensation. The procedure likewise must be considered violative of all constitutional concepts of fair play, in that it deprives those employees of their right, without notice, by what purports to be, official government action.

Leedom v. Kyne, 358 US 184, illustrates an instance of judicial review in a case where the National Labor Relations Board, an agency similar to the National Mediation Board, acted outside of its statutory authority and in excess of its delegated powers. The court took jurisdiction and struck down the unlawful act.

It is argued that *Leedom v. Kyne* does not apply here in that no specific statutory provision is made for a ballot form in the Act. Respondent contends and the decision here determined that the Act does provide, while not the actual format, the general content of a valid ballot from its various provisions and that therefore the court was entitled to intervene.

The Solicitor General is quite candid in his reference to the remand on the hearing question on review of the "Craft or class" delineation (National Mediation Board Petition for Writ of Certiorari, page 11). The decision does not require a Board hearing, nor does it enjoin the election pending a hearing by the Board. In fact, the court pointed out that it was providing the Board with an opportunity to reconsider granting a hearing in the light of the court's opinion on the requirement of the Act with respect to ballot form.

The remand did nothing more than provide the Board with a chance to again make the decision as to whether it would order a hearing on the "craft or class" after it was aware of the requirement of the Act. No action by the Board with respect to the hearing was directed or demanded.

It cannot be said that the decision providing the agency with an opportunity to reevaluate its position after being instructed as to the requirement of the Act was either a "review" of Board action, or interference by the judiciary with the exercise of the Board's discretion under the Act.

CONCLUSION

The most thoughtful and careful attention has been given this case by the various judges who have ruled on the matter. In each instance from the original granting of the Temporary Restraining Order through

the decision of the Court of Appeals, the legality and essential justice of the respondent's position has been recognized.

The National Mediation Board has been unable to demonstrate wherein its statutory authority grants to it the arbitrary power it has appropriated, or why it should deny the employees under its jurisdiction the opportunity that has for many years been afforded the employees under the National Labor Relations Board.[5]

The National Mediation Board's action was invalid under the Railway Labor Act and violative of constitutional guarantees and concepts of fair play. Judicial intervention is proper in either instance. Additionally, the provisions of the Administrative Procedure Act vest the Federal Court with jurisdiction.

The petitions for a writ of certiorari should be denied.

Dated, August 25, 1964.

Respectfully submitted,
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[5]The National Labor Relations Board provided a space for a "no representation" vote long before the National Labor Relations Act itself was amended to afford that right (Respondent's Brief on Appeal pages 24-28).

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*,

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 175-183) is reported at 330 F.2d 853. The opinion of the United States District Court for the District of Columbia (R. 133-156) and the District Court's supplemental opinion (R. 166-170) are reported at 218 F. Supp. 114.

JURISDICTION

The judgment of the Court of Appeals (R. 184, 185) was entered on March 12, 1964. The petition for a writ of certiorari was filed on June 1, 1964, and was granted on October 12, 1964 (R. 188). The jurisdiction of this Court rests on Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of the petitioner, the following questions are presented:

1. Are determinations of the National Mediation Board in the conduct of a representation investigation pursuant to the provisions of Section 2, Ninth of the Railway Labor Act (a) refusing to hold a hearing for the purpose of redetermining the composition of an already established craft or class of employees among whom a representation election shall be held, and (b) refusing to revise a long established form of ballot to be used in such an election to include thereon a space for employees to affirmatively vote against any representation, subject to judicial review?

2. If such determinations are subject to judicial review, did the National Mediation Board violate any statutory command or abuse the discretion committed to it by Section 2, Ninth of the Railway Labor Act in the conduct of a representation dispute by (a) refusing to hold a hearing for the purpose of redetermining the composition of an already established craft or class of employees among whom a representation election shall be held, and (b) refusing to revise a long established form of ballot to be used in such an election to include thereon a space for employees to affirmatively vote against any representation?

STATUTES INVOLVED

The principal statutory provision involved is Section 2, Ninth of the Railway Labor Act, (45 U.S.C.A., Section 152, Ninth). This Section reads as follows:

> "If any dispute shall arise among a carriers's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed neces-

sary by it to carry out the purposes and provisions of this paragraph."

Other statutory provisions cited are quoted in full in Appendix A hereto.

STATEMENT

This litigation had its origins in an application filed by the Brotherhood of Railway and Steamship Clerks with the National Mediation Board on August 24, 1962, requesting a certification of the Brotherhood by the Mediation Board to represent, under the Railway Labor Act (45 U.S.C.A., Section 151 et. seq.) the following craft or class of employees of United Air Lines, Inc.: (R. 36).

> "Commonly known as clerical, office, stores, (excluding stores employees represented as of August 24, 1962, by the International Association of Machinists), fleet (excluding fleet service employees represented as of August 24, 1962 by the International Association of Machinists) and passenger service employees".

This application stated that there were 12,000 employees involved and there were submitted with the application 6,606 authorization cards of such group of employees, stating their desire to be represented by the Brotherhood. The application further stated that these employees were not now represented by any organization for purposes of the Railway Labor Act. (R. 6, 36, 50.)[1]

The application was filed pursuant to the provisions of Section 2, Ninth, of the Railway Labor Act (45

[1] The Brotherhood was the duly authorized representative under the Railway Labor Act of the craft or class involved on Capital Airlines prior to the merger of that airline into United Air Lines on or about June 1, 1961. (R. 50.)

U.S.C.A., Section 152, Ninth), quoted in full page 3, *supra*.

On August 27, 1962, Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, wrote to the President of the Brotherhood, acknowledging the application. This letter also contained the following statement: (R. 48)

> "We observe from the craft description that stores employees represented as of August 24, 1962, by the International Association of Machinists, and fleet service employees represented by the same association as of the same date, are excluded from the application.
>
> "Please advise us of the significance of the date contained therein. Is it the position of your organization that employees hired in the excluded categories after August 24, 1962 would be covered by the application?"

In a letter, dated August 29, 1962, the President of the Brotherhood replied to Mr. Thompson. This letter contained the following statement as to the reasons for the Brotherhood's application excluding certain employees represented by the International Association of Machinists: (hereinafter called "IAM")

> "The meaning of our exclusion was simply that we did not intend to include in our application the incumbent of any occupation or position represented by the International Association of Machinists on August 24, 1962, but we did intend to include the incumbents of all occupations in those categories if they were represented by the International Association of Machinists by reason of an agreement with the United Air Lines, Inc., entered into at a date subsequent to August 24, 1962. Any employe hired by United Air Lines subsequent to

August 24, 1962, in the excluded categories, namely, those positions for which the International Association of Machinists was the collective bargaining agent as of August 24, 1962, is to be excluded from the representation dispute.

"In other words, and to state it simply, we wish to make it clear that our request for the services of the Board is not intended to include the incumbent of any position for which the International Association of Machinists was the collective bargaining agent on August 24, 1962, or the persons occupying those positions subsequent thereto.

"I hope I have made it quite clear that we are not contending in our application to the Board for the representation rights of the occupant of any position for which the International Association of Machinists had representation rights on August 24, 1962."

On August 30, 1962, Mr. Thompson, by letter, advised United and the IAM of the Brotherhood application. (R. 53.)

On September 7, 1962, United, in a letter signed by Mr. Charles M. Mason, Senior Vice President, Personnel, advised the Mediation Board that, in its view, the Brotherhood application "is inconsistent with the National Mediation Board's determination of craft or class in Case No. R-1706 et al." United, therefore, took the position that the application involved only a part of a group of employees which the Board had found to constitute a craft or class and should be dismissed. (R. 55.) In addition, United's letter requested that, in the event the Mediation Board did not dismiss the Brotherhood's application, it should hold a public hearing to determine whether or not the proper craft

or class was that expressed in prior determinations of the Mediation Board.

On September 11, 1962, the IAM, by letter, advised the Mediation Board that "it is our considered opinion that the craft or class of employees as requested by the Brotherhood does not conform to the findings of your Board, particularly with reference to the craft of class determination as set forth in Case R-1706 et al." (R. 57.)

Case No. R-1706 et al., which United and the IAM cited, was a formal decision issued by the Mediation Board on January 31, 1947, identified as "In the Matter of Representation of Employees of the National Airlines, Inc., Northeast Airlines, Inc., Pan American Airways, Inc., Pennsylvania-Central Airlines Corp., Radio Operators and Teletype Operators; Clerical, Office, Stores, Fleet and Passenger Service Employees —Determination of Craft or Class".[2] In this decision, the Mediation Board, upon the basis of extensive findings of fact with respect to airline operations, and the duites of employees involved in such operations, determined that, for purposes of representation under the Railway Labor Act, clerical and office employees, including office attendants, stores employees, fleet service employees and passenger service employees constituted a craft or class.

On October 5, 1962, the Brotherhood, in the light of the United and IAM objectives, amended its application to include the entire craft or class of clerical office, stores, fleet and passenger service employees of United, as described in Mediation Board determination R-1706.

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[2] The case involved Mediation Board Dockets Nos. R-1706; R-1708; R-1719; R-1720; R-1721; R-1729; R-1735. (R. 37.)

(R. 59.) The amended application was docketed as NMB Case No. R-3590 on November 8, 1962. (R. 37.)

On November 19, 1962, the Mediation Board assigned a mediator to check the authorization cards furnished by the Brotherhood in support of its application against a list of employees of the carrier (R. 37). On December 19, 1962, the Mediation Board authorized that an election be conducted among the employees involved based on the mediator's report that his investigation showed sufficient evidence to warrant a finding that a representation dispute existed among these employees under the Board's rules. (R. 37.) On the same day, the mediator requested United to furnish, by January 14, 1963, for the purposes of such election, a list of the employees involved, showing names, occupations, locations, and home mailing address. (R. 37.)

On January 11, 1963, United advised the Mediation Board by letter that the mediator's request for the list of employees to conduct an election "is premature in the absence of a ruling from the Mediation Board on the request of United made September 7, 1962 that a public hearing be held to establish the proper crafts and classes on United." The letter further stated that United renewed its request that such a public hearing be held. (R. 61.) In fact, United, by its letter of September 7, 1962, had requested a hearing for such a redetermination of the craft or class only in the event that the Board did not dismiss the Brotherhood's original application because it did not cover the whole craft or class set forth in the Mediation Board's determination identified as R-1706. (R. 56.) When the Brotherhood amended the application on October 5, 1962 to embrace the whole craft or class covered by that determination, that objection was eliminated, and

United did not make another request for a hearing. It waited until January 11, 1963, or more than three weeks after the mediator had requested the carrier to supply a list of the employees for the purpose of holding an election on the Brotherhood's amended application to ask for a hearing to redetermine the scope of the craft or class.

On January 17, 1963, Mr. Thompson, by direction of the Mediation Board, advised United that its request for a hearing was denied. Mr. Thompson's letter read, in pertinent part, as follows: (R. 70)

> "The application filed by the Brotherhood of Railway and Steamship Clerks on August 24, 1962 was not dismissed, and was subsequently amended to cover the craft or class commonly known as Clerical, Office, Stores, Fleet and Passenger Service Employees. You were so advised by copy of Mr. Harrison's letter of October 5, 1962 transmitted with copy of our letter to Mr. Harrison dated October 8, 1962.
>
> "In our letter of October 24, 1962, addressed to you and President Hayes of the International Association of Machinists, we inquired whether you were in a position to furnish the number of employees in this craft or class as requested in the last paragraph of our letter of October 8, 1962. On November 2, 1962 you replied and stated 'the records of United Air Lines indicate there is a total of 12,451 employees as of October 15, 1962 in such craft as we understand it'. You further stated this figure did not include 339 employees classified as Lead Janitors or Cleaning Women as of October 15, 1962. Your letter of November 2, 1962 indicated a clear understanding of what is meant by the craft or class commonly known as Clerical Office, Stores, Fleet and Passenger Serv-

ice Employees as referred to in the Board's determination issued in NMB Case No. R-1706, et al.

"The various comments made in the remainder of your letter of January 11, 1963 have been given careful consideration by the Board. The Board wishes to call your attention, first, to the fact that the carrier is not a party to this representation dispute. Secondly, no request for a review of the craft or class established by the Board's determination in Case No. R-1706, et al. has been received from either organization party to NMB Case No. R-3590. *The request contained in your letter of January 11, 1963 is not timely made, since the Board, on December 19, 1962, found that a representation dispute existed among the employees in this craft or class, and has authorized an election.*

"For the above reasons, the Board must deny your request of January 11, 1963 for a public hearing on the subject of a review of the determination made in Case No. R-1706, et al." (Emphasis added)

The letter concluded by requesting United to furnish promptly to the mediator the necessary information regarding the employees involved, so that an election could be held.

On January 18, 1963, United addressed a letter to the Chairman of the Mediation Board, stating that it was "willing" to allow a ballot box election on the company property, provided that the Board should use a form of ballot which would provide a space for "no representation". This letter also stated that "we want to make it very clear that United Air Lines recognizes that how a representation election is conducted is the function of the National Mediation Board". The letter stated, however, that the carrier strongly felt that the ballot previously used by the Board was not adequate

because it did not provide a space for the employee to vote "no representation". (R. 79.)

On January 24, 1963, the Executive Secretary of the Mediation Board, at the direction of the Board, replied to United's letter, advising the carrier that it saw "no reason to deviate from its customary form of ballot in the current dispute, and it will be used by the mediator in conducting the election in Case No. R-3590". (R. 86.) This letter read, in pertinent part, as follows:

> "As you state in your letter, the form of ballot presently used was adopted by the Board in 1934 and has been used since that time as the form best designated to ascertain the representation desires of a carrier's employees for the purpose of collective bargaining. The blank line appearing on the present form of ballot affords an opportunity to the voter to vote for some organization or individual other than those named on the ballot, or he may refrain from voting at all if he so chooses. There is no compulsion that he vote for a contestant for representation. Introduction of a "yes" or "no" ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees for the purposes described in Section 2, First and Second of the Railway Labor Act * * *."

The form of ballot to which the Mediation Board's letter refers as having been in use since 1934, provides a square in which the voting employee may mark an "X" if he wishes to vote to be represented by any of the organizations or individuals whose names are listed thereon. It also has an additional space in which the employee may insert the name of any other organi-

zation or individual whom he desires to represent him. (R. 87, 112.)

The background and reason for this traditional form of ballot used by the Mediation Board in some 3,400 representation elections under the Railway Labor Act since 1934 is stated by the Board as follows: (R. 162, 163)

> "Occasionally, it is suggested that the ballot used by the National Mediation Board does not permit a clear expression by a majority of eligible voters of the representation preference. The Mediation Board adopted, among the first rules issued by it, its present form of ballot and it has been used consistently since that time.
>
> "The pertinent part of the ballot provides a space to vote for the contending organizations and, in addition thereto, the following:
>
> > If you desire to be represented by any other organization or individual write the name of such organization or individual in the space below.
> >
> > . . . . . .
> >
> > And mark an "X" in this square ☐
>
> "The form of ballot used is based on the general purpose of the Railway Labor Act as contained in section 2, which provides, among other purposes, for the complete independence of carriers and of employees in the matter of self organization; and, 'to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules of working conditions.' In the furtherance of these general purposes, section 2, second, of the act makes it the duty of the carriers and their employees to consider and, if possible, decide, all disputes, 'in conference between representatives designated and authorized so to confer, respectively,

by the carrier or carriers and by the employees thereof interested in the dispute.' Section 2, third, provides that 'representatives, for the purpose of this act, shall be designated by the respective parties without interference, influence, or coercion by either party after the designation of representatives by the other * * *.'

"The above-quoted excerpts from the act show clearly that it was the intent of Congress in framing the 1934 amendments to the original Railway Labor Act of 1926, that both the carriers and employees separately designate representatives for the purposes of collective bargaining. To effectuate this mandate of the Congress, the National Mediation Board, in 1934, designed the form of ballot which has been used without material change to the present time. This ballot was drafted to permit the employees to secure some form of representation, as contemplated in the sections of the law quoted above. It leaves to the majority of the employees of any craft or class full freedom to determine who shall be their representative for the purposes of the act."

On January 25, 1963, United wrote to the Mediation Board, asking the Board to reconsider the Board's refusal to hold a public hearing to redetermine the scope of the class or craft involved, as requested in United's letter of January 11, 1963. (R. 72.) On February 4, 1963, the Mediation Board denied United's request for reconsideration of the Board's earlier decision not to redetermine the craft or class involved. (R. 76.)

On February 1, 1963, United requested reconsideration of the Mediation Board's decision of January 24, 1963 with respect to the form of ballot to be used in the impending representation election upon the property of the carrier. (R. 89.) This request was denied by

the Mediation Board on February 6, 1963, on the basis of the reasons previously given. (R. 96.)

On February 4, 1963, the mediator inquired of United as to the status of its list of the employees eligible to vote in the representation election and was advised by the carrier that the list would be completed by approximately February 11, 1963. (R. 39.) On that date, the mediator made further inquiry concerning the status of the list and was advised that the carrier had decided to refuse to furnish the list. The carrier formally notified the Board of its refusal by letter of the same date. (R. 40.)

Also on February 12, 1963, United filed a complaint in the United States District Court for the District of Columbia, *United Air Lines, Inc.*, v. *National Mediation Board, et al.* (Civil Action 402-63), in which United asked the District Court to enjoin the Mediation Board from conducting any election among the carrier's employees or certifying any representation with respect thereto upon the Brotherhood's application in Case No. R-3590 without first conducting a hearing, and according United an opportunity to be heard as a party in interest, on the question of the appropriateness of the class or craft of employees among whom the election should be held. In addition, the complaint asked the Court to enjoin the Mediation Board from conducting the election unless the form of ballot used permitted an eligible employee affirmatively to vote against representation.

On March 25, 1963, the District Court granted a motion of the National Mediation Board to dismiss the complaint. Thereafter, United appealed this judgment and order to the Court of Appeals. Such appeal was designated as Case No. 17,777.

In the meantime, on February 14, 1963, the Assoication for the Benefit of Non-Contract Employees filed a petition with the National Mediation Board, asking leave to intervene in the representation proceedings before that Board in Case No. R-3590. This petition also requested (1) a redetermination of the craft or class grouping involved in the election, either with or without a hearing, and (2) that the form of ballot to be used in the representation election be changed to provide a place for employees to vote affirmatively for no representation. (R. 43, 102.) On February 24, 1963, the Association advised the Board that it did not seek recognition as a bargaining agent and did not want its name on the election ballot, and would be dissolved after it had served its purpose. (R. 111.)

On March 27, 1963, the Mediation Board denied the petition of the Association. (R. 14, 26, 44.) On April 5, 1963, such Association requested reconsideration of this action, which the Mediation Board denied on April 12, 1963. (R. 44, 45, 111.)

The Mediation Board completed the formulation of an eligible list of voters and the representation election was scheduled to be conducted by mail ballot on April 22, 1963. (R. 26, 27.) On April 13, 1963, the Association filed a complaint in the United States District Court for the District of Columbia, asking that Court to enjoin the Mediation Board from conducting such election among the class or craft involved unless the Board should (1) first conduct a hearing relative to the appropriateness of the class or craft designated; (2) grant the Association status as a party in said hearing; and (3) offer a ballot upon which voting employees could vote for or against representation. (R. 4-9.)

The Association also filed a motion for a preliminary injunction on April 13, 1963 (R. 2, 22), which was opposed by the National Mediation Board. (R. 35.)

On April 18, 1963, the District Court issued a temporary restraining order prohibiting the Mediation Board from conducting the representation election scheduled for April 22, 1963. (R. 2, 33.)

On May 3, 1963, the District Court granted a preliminary injunction which read as follows: (R. 132)

> "ORDERED That the plaintiff's motion for a preliminary injunction enjoining the defendant from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of ballot does not permit a voting employee to cast a vote against collective bargaining representation shall be and the same is hereby granted, and it is
>
> "FURTHER ORDERED That the defendant shall have one week from today's date to show cause why the preliminary injunction above granted shall not be made permanent, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act, 45 U.S.C. § 151 *et seq.* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

This preliminary injunction was accompanied by findings of fact and conclusions of law. (R. 129-156.)

On May 10, 1963, the Mediation Board filed a motion to dismiss the complaint, or in the alternative for summary judgment. (R. 159.) At the same time the Board responded to the District Court's order of May 3, 1963, to show cause why the preliminary injunction should not be made permanent, opposing a permanent injunction and requesting that the preliminary injunction be vacated or stayed to permit the Mediation Board to conduct the proposed election. (R. 158.)

On May 8, 1963, the Brotherhood filed a petition to intervene as a party defendant in the case and tendered to the District Court an answer to the complaint. (R. 3, 157.) By order dated May 29, 1963, the District Court granted the Brotherhood's motion to intervene. (R. 171.)

On May 29, 1963, the District Court also entered its final judgment and order, which enjoined the National Mediation Board in the conduct of an investigation of the representation dispute on the property of United as follows: (R. 170)

> "FURTHER ORDERED That the Board is hereby permanently enjoined from conducting any election among the 'Clerical, Office, Stores, Fleet and Passenger Service employees' of United Air Lines, Inc., in which the form of the ballot does not permit a voting employee to cast a vote against collective bargaining representation, and it is
>
> "FURTHER ORDERED That the plaintiff's request that the Board shall conduct a hearing relating to the question of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion

that the Railway Labor Act, 45 U.S.C. § 151 *et seq* gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation."

On July 16, 1963, the Brotherhood appealed the judgment of the District Court by filing a notice of appeal in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure. (R. 172.) This appeal was designated as Case No. 18,072. On July 26, 1963, the National Mediation Board filed a notice of appeal from the judgment of the District Court. (R. 173.) This appeal was designated as Case No. 18,068.

The Court of Appeals consolidated United's appeal from the District Court order dismissing its Complaint in Case No. 17,777 with Cases Nos. 18,068 and 18,072 for hearing and decision. On March 12, 1964, the Court of Appeals issued its opinion in the consolidated cases. (R. 175-177.) In this opinion, the Court of Appeals affirmed the judgment of the District Court dismissing the complaint of United on the grounds that the carrier lacked standing to sue. The opinion affirmed the judgment of the District Court on the appeals of the Brotherhood and the National Mediation Board in Cases Nos. 18,068 and 18,072.

Circuit Judge Wright filed a separate concurring and dissenting opinion. (R. 178-183.) In this opinion, Judge Wright concurred in the decision to affirm the District Court's dismissal of the complaint by United, but dissented from the majority opinion affirming the District Court's judgment on the appeals of the Brotherhood and the National Mediation Board.

The majority opinion affirming the District Court's judgment on the appeals of the Brotherhood and the

National Mediation Board adopted the opinion of the District Court. (R. 177.)

SUMMARY OF ARGUMENT

I

Section 2, Ninth of the Railway Labor Act places a duty upon the National Mediation Board at the request of employees of a carrier parties to a representation dispute on the property of a carrier to investigate the dispute and certify the name or names of the individuals or organizations designated and authorized to represent the employees involved. The statute does not require the National Mediation Board to follow any designated procedure in the conduct of such investigation. It specifically authorizes the Board to take a secret ballot of the employees involved or "to utilize any other appropriate method" of ascertaining the duly designated and authorized representatives of the carrier's employees in such manner as to insure a choice without interference, influence, or coercion exercised by the carrier. If the Board determines to conduct an election the statute provides that it shall designate who may participate and establish the rules to govern such election. The Brotherhood requested the Board under this statutory provision to investigate and determine the representatives of a craft or class of employees of United Air Lines known as clerical, office, stores, and passenger service employees. A determination of the composition of this craft or class on the property of United among whom a representation election should be held is committed to the National Mediation Board by Congress and such determination is not subject to judicial review. Likewise, a determination by the Mediation Board as to the form

of ballot to be used in such an election constitutes an exercise of discretion by the Mediation Board as to the rules to govern such election which is not subject to judicial review. *Switchmen's Union of North America, et al.* v. *National Mediation Board, et al.*, 320 U.S. 297.

The decision of the Mediation Board not to hold a hearing for the purpose of redetermining the composition of the craft or class among whom the representation election should be held does not violate any right granted to United Air Lines or to any of the employees of that carrier by Section 2, Ninth of the Railway Labor Act or by the United States Constitution. Likewise, a determination by the Board that it would not revise the form of ballot to be used in such representation election so as to include thereon a place for employees to affirmatively vote "no union" does not violate any right given to the carrier or to its employees by either the United States Constitution or Section 2, Ninth or any other provision of the Railway Labor Act. These determinations constitute decisions as to the manner in which the Mediation Board shall carry out its functions under Section 2, Ninth and are not thus subject to judicial review. The decision below that the Mediation Board's determination violates the stated policy of the Railway Labor Act of majority determination is in error since the Board requires a majority of the craft or class to vote in an election before it will certify a representative. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560.

II

The basic purpose of the Railway Labor Act (45 U.S.C.A., Sections 151 et seq.) is to avoid interrup-

tions to commerce or to the operation of carriers engaged therein and to provide for the prompt and orderly settlement of disputes between employees and carriers. The statute is aimed at accomplishing this purpose by inducing collective bargaining between representatives of the employees and carriers to settle labor disputes. This basic purpose of the statute was recognized by this Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515.

The determinations made by the Mediation Board with respect to the composition of the craft or class in this case reasonably contribute to such purpose without depriving either United Air Lines or any of its employees of any constitutional or statutory right. In refusing to conduct a hearing to redetermine the previously established composition of the craft or class of United's employees among whom a representation election would be held, the Mediation Board was simply exercising its discretion to maintain the stability of existing collective bargaining agreements and employee-employer relationships in the airline industry. The Board's decision to continue in use a form of ballot which it has successfully used for more than 30 years in some 3400 representation elections was based upon a long standing and publicly stated belief that such form of ballot contributed to the statutory scheme while a revision of the ballot as requested would contribute to, if not actually encourage, the circumvention of the Congressional purpose. This is a reasonable and valid judgment. There is no compulsion upon any employee to vote for any representative or to vote in the representation election at all. If the employee does not wish to have a representative, he may refrain from voting for any one of those seeking certification

as a representative. If a majority of the employees do not wish to vote for a representative, then none can be certified.

ARGUMENT

I

The Determinations of the National Mediation Board With Respect to the Composition of the Craft or Class of Employees of United Air Lines Among Whom a Representation Election Should be Held and the Form of Ballot to be Used in Such Election Are Not Subject to Judicial Review

The action of the National Mediation Board, which is the subject of this litigation, was taken in the course of that Board's conduct of an investigation to determine who are the representatives of a designated craft or class of employees of United Air Lines upon application of the Brotherhood of Railway and Steamship Clerks to the Board under Section 2, Ninth of the Railway Labor Act. The cited statutory provision (quoted above at page 3) requires the Board upon the request of a party to a representation dispute among employees of a carrier subject to the Railway Labor Act to investigate the dispute and to certify the designated and authorized representative of the employees involved. It further requires the carrier involved to treat with the representative so certified. The statute does not direct that the Mediation Board shall conduct its investigation in any particular manner. Indeed, the statute specifically authorizes the Board to conduct a representation election among the employees involved or to utilize "any other appropriate method" of ascertaining the authorized representative. The only limitation is that the method used shall insure the choice of representatives "without interference, influence or coercion exercised by the carrier." The statute spe-

cifically provides that if the Board does decide to hold a representation election it shall designate the participants and it shall establish the rules to govern the election.

In the present case, the National Mediation Board decided in the conduct the investigation required of it under Section 2, Ninth of the statute to hold a representation election on the property of United Air Lines. For this purpose, it exercised its statutory authority to designate the employees who would participate in such representation election. This designation embraced the long established craft or class of clerical, office, stores, and fleet and passenger service employees as such craft or class had previously been determined by the Board. (R. 37.) The Board refused the request of both United and the Association for the Benefit of Non-Contract Employees to either change the craft or class or conduct a hearing for the purpose of redetermining such craft or class. (R. 70, 14, 26, 44, 45, 111.) The Board also exercised its statutory authority to establish the rules governing such election, including the form of ballot to be used therein. In so doing, it refused the request of both United and the Association for the Benefit of Non-Contract Employees to revise the form of ballot to be used to specifically provide thereon a place for the employees to affirmatively vote "no union". (R. 86, 89, 111.) The Brotherhood submits that these actions of the Mediation Board constituted determinations of the Board as to the manner in which it should conduct its duties under Section 2, Ninth of the Railway Labor Act and are not subject to judicial review.

In 1943, this Court held that determinations of the National Mediation Board with respect to matters com-

mitted to the Board's judgment under Section 2, Ninth of the Railway Labor Act were not subject to judicial review. *Switchmen's Union of North America, et al.* v. *National Mediation Board, et al.*, 320 U.S. 297 (1943); *General Committee, BLE* v. *Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943); *Brotherhood of Railway and Steamship Clerks, et al.* v. *United Transport Service Employees of America, et al.*, 320 U.S. 715 (1943).[3] In the *Switchmen's Union* case, this Court referred to the extreme care which Congress had taken in the enactment of Section 2, Ninth to protect the Mediation Board in the handling of representation problems (pages 302, 303). The Court then observed as follows: (page 303)

> "Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain."

This Court also compared the authority of the Mediation Board under Section 2, Ninth to that of the Interstate Commerce Commission under Section 204 of the Transportation Act of 1920, the exercise of which was not subject to judicial review whether the Commission

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[3] In the latter case, this Court reversed a judgment of the United States Court of Appeals for the District of Columbia Circuit subjecting to judicial review a determination of the National Mediation Board to dismiss an application for invesitgation of a representation dispute. *Brotherhood of Railway and Steamship Clerks, et al.* v. *United Transport Service Employees of America*, 137 F. 2d 817 (1943).

made an error of fact or of law, and set forth the following conclusion: (page 305)

> "In the present case the authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is no less clear and no less essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is no less explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. Like the command in the Butte A. & P. R. Co. Case it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."

In the *General Committee* case, decided on the same day, this Court likewise refused to review a decision of the National Mediation Board in a controversy between two unions as to which was the proper collective bargaining representative under the Railway Labor Act. In its opinion in that case, the Court stated as follows: (page 337)

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected

where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration."

These decisions have been the established law with respect to determinations of the National Mediation Board in the performance of its functions under Section 2, Ninth for more than two decades. During this period of time, the lower Federal courts have consistently refused to review determinations of the National Mediation Board as to the manner in which it shall conduct its investigation under Section 2, Ninth and the decisions which it has made in the conduct of such investigations. *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 314 F.2d 234 (D.C. Cir., 1962); *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 294 F.2d 905 (D.C. Cir., 1961); *Airline Stewards and Stewardesses Association* v. *National Mediation Board, et al.*, 294 F.2d 911 (D.C. Cir., 1961), *cert. den.* 369 U.S. 810; *Decker, et al.* v. *Linea Aeropostal Venezolana, et al.*, 258 F.2d 153 (D.C. Cir., 1958); *Airline Dispatchers Association, et al.* v. *National Mediation Board, et al.*, 189 F.2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849; *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 179 F.2d 446 (D.C. Cir., 1949); *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 141 F.2d 724 (D.C. Cir., 1944); *National Federation of Railway Workers, et al.* v. *National Mediation Board, et al.*, 141 F.2d 725 (D.C. Cir., 1944); *Brotherhood of Railway and Steamship Clerks, Etc.* v. *Atlantic Coast Line R. Co.*, 201 F.2d 36 (4th Cir., 1953); *Rose, et al.* v. *Brotherhood of Railway and Steamship Clerks*, 181 F.2d 944 (4th Cir., 1950).

These decisions included the decision of the Court of Appeals for the District of Columbia Circuit in the *Decker* case, *supra*, in which that court sustained a dismissal of a complaint alleging that the Mediation Board had denied a right to vote of certain employees in a representation election and made the precise challenge to the form of ballot used by the Mediation Board as is made in the present case.

The one case in which a determination of the National Mediation Board under Section 2, Ninth was subjected to review during this period was the decision in *Airline Dispatchers Association; et al.* v. *National Mediation Board, et al.*, 189 F.2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849. In that case the Mediation Board had made a determination that it did not have any power to act under Section 2, Ninth with respect to a representation dispute involving employees of United States air carriers employed outside of the United States. The question presented for judicial review was whether or not the Board's interpretation of the statute was correct. In holding that the decision of the Board with respect to such a question was subject to judicial review, the Court of Appeals drew a sharp distinction between such an issue and cases concerning issues of the manner in which the Board has performed its functions under Section 2, Ninth. It pointed out that decisions of the Mediation Board in the latter category were not subject to judicial review. That Court's statement on this point read as follows: (pages 687-688)

> "In each of these cases[4] the Board had chosen between alternate methods of settling a dispute

[4] The reference was to cases in which judicial review of Mediation Board determinations had been rejected.

over representation under Section 2, Ninth, of the Act. The question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner. The case now before us is quite different. Here there has been a refusal to take any action to resolve the dispute, upon the view that Congress has not extended the powers of the Board to an employer and its employees geographically situated as are these disputants; that is, outside the continental United States and its territories. This in no sense is Board action within the framework of Section 2, Ninth, or, indeed, within any other of the provisions of the Act for administrative resolution of industrial-labor disputes. This is a different 'type of problem' (320 U.S. at page 301, 64 S.Ct. at page 97, 88 L.Ed. 61)."

Similarly, in the case of *Leedom* v. *Kyne,* 358 U.S. 184 (1958), this Court held that a decision of the National Labor Relations Board, which was in direct violation of a specific statutory command of Section 9 (b)(1) of the National Labor Relations Act (29 U.S.C.A., Section 159(b)(1)), was subject to judicial review. This Court explained the difference between such situation and that involved in the *Switchmen's Union* case in the following language. (pages 189-190)

"In Switchmen's Union v. National Mediation Board, 320 US 297, 88 L ed 61, 64 S. Ct. 95, this Court held that the District Court did not have jurisdiction of an original suit to review an order of the National Mediation Board determining that all yardmen of the rail lines operated by the New York Central System constituted an appropriate bargaining unit, because the Railway Labor Board had acted within its delegated powers. But in the course of that opinion the Court announced principles that are controlling here. 'If the absence of jurisdiction of the federal courts meant a sacri-

fice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 US 548, 74 L ed 1034, 50 S Ct 427, and Virginian R. Co. v. System Federation, R. E. D. 300 US 515, 81 L ed 789, 57 S Ct. 592. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose.' Id. 320 US at 300.

"Here, differently from the Switchmen's Case, 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control (A. F. of L. v. NLRB, 308 US 401, 84 L ed 347, 60 S Ct 300, supra), to protect and enforce that right."

The present inquiry, therefore, must clearly be directed to the question of whether or not the action of the National Mediation Board here involved violated a direct statutory command.

The opinion of the District Court, adopted by the Court of Appeals, states that "The basic question is whether the Railway Labor Act denies to voters certified as eligible to vote in an election held pursuant to 45 U.S.C. Section 152, Ninth, for the selection of a collective bargaining representative, the chance to vote for no representation at all." (R. 144.) This statement

of the problem completely reverses the nature of the inquiry to be made to determine whether there is present a case for judicial review, as set forth in this Court's decisions quoted above. Instead of an examination of the statute to determine whether the Mediation Board has violated any commands thereof or obliterated any rights provided therein, the decision below substitutes an inquiry into whether the statute prohibits the form of ballot sought by United and the respondent. The Brotherhood submits that this approach is erroneous. Section 2, Ninth authorizes the Mediation Board to establish rules governing a representation election. Under this Court's decisions discussed above, the Board determination to use a particular form of ballot is not open to judicial review unless it violates a direct statutory command.

The District Court did hold that the action of the Mediation Board with respect to the form of ballot to be used gave rise to a serious issue of statutory construction possibly rising to constitutional dimensions and was therefore subject to judicial review under the decision in the *Airline Dispatchers* case and this Court's decision in *Leedom* v. *Kyne, supra.* (R. 143, 144, 168, 169.) The Court of Appeals adopted the view of the District Court. (R. 177.) Neither the District Court nor the Court of Appeals cited any specific provision of Section 2, Ninth or of any other provision of the Railway Labor Act which the Mediation Board's decision violated. Rather their conclusion was based upon a finding that the Board's use of its present ballot in a representation election on the property of United "would obliterate the right to vote for no collective bargaining representation and would thus be contrary to the Railway Labor Act's stated policy of majority

determination." (R. 169.) The Courts below therefore, concluded that the Mediation Board's action with respect to the form of ballot to be used raised a question of statutory construction which is subject to judicial review.

However, the form of ballot which has been used by the National Mediation Board for some 30 years (R. 161) does not violate any stated policy of the Railway Labor Act of majority determination. If less than a majority of eligible employees of a craft of class participate in a representation election, then the Mediation Board will not certify a representative under Section 2, Ninth. (R. 122.) Its form of ballot does not, therefore, violate any statutory policy of majority determination unless the statute is read as requiring a majority of the craft or class to vote for a particular representative in order for that representative to be designated under Section 2, Ninth. There is no such requirement in the statute. Section 2, Ninth leaves to the Board the designation of those who may participate in the election and the establishment of rules to govern the election. Section 2, Fourth of the statute (45 U.S.C.A., Section 152, Fourth) provides that a "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." However, this provision does not require that a representative secure a majority of the votes of the craft or class in order to be designated as a statutory representative. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, 560 (1937). In that case this Court spoke as follows on the point: (page 560)

> "Petitioner assails the certification of the Federation as the representative of the blacksmiths be-

cause less than a majority of that craft, although a majority of those voting, voted for the Federation.

"Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. * * *

"We see no reason for supposing that § 2, Fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer."

The present form of ballot used by the Board and the rules and regulations of the Board meet the statutory requirement as thus interpreted. Indeed, the mere use of the form of ballot required by the District Court's order would not insure that the representative receive a vote of the majority of the craft or class since it would still be possible for a majority of the craft or

class to vote and the representative designated to receive only a majority of such votes.

Thus, the judgment below errs when it reviews and reverses the action of the Mediation Board in determining the form of ballot to be used in a representation election under Section 2, Ninth.

Nor does there appear any justification for reviewing the Mediation Board's determination not to review the composition of the craft or class of employees among whom the representation election shall be held. This Court's decisions cited above establish that this is a matter committed by Congress to the judgment of the Mediation Board.

II

The Actions of the National Mediation Board Constituted a Reasonable Exercise of Its Discretion of the Manner in Which the Board Should Perform Its Functions Under Section 2, Ninth of the Railway Labor Act in the Furtherance of the Purposes of That Statute and Do Not Violate Any Statutory Command.

The basic purpose of the Railway Labor Act is to avoid interruption to interstate commerce by providing for the prompt and orderly settlement of disputes between employees and carriers subject to that statute. The statute is aimed at accomplishing this purpose by inducing collective bargaining between representatives of employees and carriers. Thus, Section 2, First of the Act (45 U.S.C.A., Section 152, First) makes it the duty of all carriers and employees to exert every reasonable effort to make and maintain agreements and to settle disputes in order to avoid interruptions to commerce; Section 2, Second requires that all such disputes "shall be considered, and, if possible, decided, with all expedition, in conference between representa-

tives designated and authorized so to confer * * * by the carrier * * * and by the employees thereof * * * *;" Section 2, Sixth makes it a duty of designated representatives and the carrier to meet and confer with respect to grievances or disputes growing out of the interpretation or application of agreements; Section 6 provides that carriers and "representatives of the employees" shall give written notice of intended changes in agreements and for conferences "between the representatives of the parties interested" in such changes for the purpose of negotiation and mediation, if necessary, thereon; Section 7 provides that when a controversy arises between a carrier and its employees which is not settled either in conference "between representatives of the parties" or by mediation or by the adjustment board, such parties may submit the issue to arbitration.

This Court in its decision in *Virginia Railway Company* v. *System Federation No. 40*, 300 U.S. 515 (1937), specifically recognized that this statutory scheme was aimed at the settlement of disputes between carriers and employees through a process of collective bargaining between representatives of the parties. Thus, the Court stated (page 548) that the statute is "aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them." In the same opinion the Court stated (page 553) that "What has been said indicates clearly that its provisions are aimed at the settlement of industrial disputes by the promotion of collective bargaining between employers and the authorized representative of their employees * * *." Finally, the Court stated (page 560) that the Act "is

dependent for its operation upon the selection of representatives."

It was to effectuate this purpose that the National Mediation Board, in 1934, designed the form of ballot which has been used in more than 3400 representation elections without material change to the present time. (R. 161-163.) It was the view of the Board in refusing the proposals to change the ballot which it had successfully used for some three decades so as to provide a place for an employee to affirmatively vote "no union" such change would contribute to, if it actually did not encourge, an effort to defeat the statutory purposes. (R. 86.)

This view of the statute, the form of ballot used, and the reasons therefore have been set forth in the offiical publications of the Mediation Board. (R. 161-163.)

It is respectfully submitted that this decision of the Mediation Board constituted a reasonable exercise of its discretion in administering Section 2, Ninth of the Railway Labor Act and does not violate any command of that statute. The form of ballot used recognizes the basic framework of the statute as encouraging collective bargaining, but at the same time does not require any employee to vote for any particular representative or, indeed, to vote for any representative at all. An employee who does not desire representation may simply decline to vote and, if a majority of the employees of the craft or class are in this category, no representative will be elected or certified. (R. 46, 121, 122.) No statutory provision gives an employee the right to be provided a form of ballot on which to record a no representation vote.

Thus, even if the action of the Mediation Board were subject to judicial review, the record discloses that the Board has performed its functions in a reasonable manner within the framework of the statute involved and has not violated any rights granted by the statute.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

PROVISIONS OF RAILWAY LABOR ACT

Section 2, First (45 U.S.C.A., Section 152, First):

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second (45 U.S.C.A., Section 152, Second):

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Fourth (45 U.S.C.A., Section 152, Fourth):

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in per-

forming any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages, of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Sixth (45 U.S.C.A., Section 152, Sixth):

"In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held:

Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice:

And provided further, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

Section 6 (45 U.S.C.A., Section 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Section 7, First (45 U.S.C.A., Section 157, First):

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise:"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, *Petitioner*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*

No. 139

UNITED AIR LINES, INC., *Petitioner*

v.

NATIONAL MEDIATION BOARD, ET AL., *Respondents*

No. 369

NATIONAL MEDIATION BOARD, ET AL., *Petitioners*

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CONSOLIDATED BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, AMICUS CURIAE

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CONSOLIDATED BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, AMICUS CURIAE

PRELIMINARY STATEMENT—INTEREST OF THE AMICUS CURIAE

The Railway Labor Executives' Association (Association), on whose behalf this brief as *amicus curiae* is presented, is a voluntary unincorporated association with which are affiliated through their chief executives twenty-three national and international railroad labor

organizations that are the duly authorized representatives under the Railway Labor Act of the vast majority of the nation's railroad employees. In addition, some of these organizations are also the duly authorized representatives under the Railway Labor Act of employees of various air carriers, including employees of United Air Lines (United). The names of these individual organizations are as follows:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railroad Trainmen
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization, Masters, Mates and and Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers

In accordance with the Rules of this Court the consent of all parties to the cases under review has been obtained for the filing of this brief by the Association as *amicus curiae* and such consents have been filed with the Clerk of the Court.

Three questions of vital importance to the Association concerning the administration of the Railway Labor Act by the National Mediation Board (Board) are presented for decision. In our judgment these questions are:

1. Whether the District Court had jurisdiction to enjoin the National Mediation Board from conducting a representation election under Section 2, Ninth of the Railway Labor Act because the Board (a) declined to change its form of ballot to be used in the representation election so as to include thereon a space for employees to affirmatively vote against any representation; and (b) denied a hearing for the purpose of redetermining the composition of an already established craft or class of employees among whom the representation election would be held.

2. Assuming, *arguendo*, jurisdiction to exist, whether the National Mediation Board violated any statutory requirement or abused its discretion under Section 2, Ninth of the Railway Labor Act in declining to change the form of the ballot or hold the hearing as aforesaid.

3. Whether an air carrier has standing under the Railway Labor Act to challenge the National Mediation Board's craft or class determination or the form of ballot which it uses in employee representation elections.

The Association believes that the separate opinion of Circuit Judge Wright of the court below correctly in-

terpreted the law applicable to these question (R. 178-183)[1] * and in support of that position submits the following argument.

I

Determinations of the National Mediation Board as to the Form of the Ballot to be Used in Representation Elections or the Composition of the Craft or Class of Employees Among Whom the Election Shall Be Held Were Not Within the Jurisdiction of the District Court

The question of jurisdiction which seems to us of initial importance was given scant attention by the court below except in the separate dissenting opinion of Circuit Judge Wright. The majority of the Court of Appeals simply adopted the opinion of District Judge Youngdahl and let it go at that (R. 177) despite the fact that briefs filed by the Government and the Brotherhood of Railway and Steamship Clerks (Brotherhood) pointedly called the attention of the Court of Appeals to the apparent conflict between the District Court's decision and decisions of this Court dating back to 1943 as well as a long line of decisions by the Court of Appeals itself denying jurisdiction under circumstances comparable to those here involved.

In 1943 this Court held in *Switchmen's Union of North America, et al.* v. *National Mediation Board, et*

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[1] In this separate opinion Judge Wright concurred in the decision of the Court of Appeals to affirm the District Court's dismissal of the complaint by United Air Lines (No. 139), but dissented from the majority affirming the District Court's judgment by a different judge in the cases involving the Association for the Benefit of Non-Contract Employees (ABNE), Nos. 138 and 369.

* All references to the Record of Cases No. 138 and 369 involving respondent ABNE will be designated "R." followed by the page reference. Reference to the Record in Case No. 139 involving petitioner United Air Lines will be designated as "United R." followed by the page reference.

al., 320 U.S. 297, 305 that it was beyond the jurisdiction of a district court to review or question the interpretation by the National Mediation Board of the meaning of the word "craft" as used in Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. In that case a railroad union which had lost an election sought to attack the certification issued by the Board on the ground that the Board had violated the Railway Labor Act by defining the craft or class in which the election was conducted on a carrier-wide rather than a divisional basis. In holding that the Board's statutory interpretation was not subject to judicial review this Court reviewed at length the legislative history of the Railway Labor Act and particularly Section 2, Ninth and said that if Congress had desired to implicate the federal judiciary and to give to the federal courts the final say "on any aspect of the problem", it would have made such intention plain (Id. p. 303). On the contrary, it said that the dispute was to reach its last terminal point when the Board's determination was made and that there "was to be no dragging out of the controversy into other tribunals of law." (Ibid. p. 305.)[2] Two other decisions of this Court decided the same day as the *Switchmen's* case, *General Committee* v. *Missouri-K.T.R. Co.*, 320 U.S. 323 and *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338, and a case decided the next month, *Brotherhood of Railway and Steamship Clerks, Etc.*, v. *United Transport Service Employees*, 320 U.S. 715, supplemented and reinforced the jurisdictional decision in the *Switchmen's* case.

[2] An interesting point of this decision is the fact that the issue of jurisdiction had not been raised by the Board or any of the parties in the *Switchmen's* case before the District Court, the Court of Appeals, or this Court. (See *Switchmen's Union of N. America* v. *National Mediation Board*, 135 F. 2nd 785 (D.C. Cir., 1943). It was raised by this Court itself and the parties were directed to brief and argue it. (See 319 U.S. 737.)

The holding that determinations of the National Mediation Board under Section 2, Ninth of the Railway Labor Act were not subject to judicial review has been followed consistently since 1943, with the sole exception of the decisions here under review, by the lower federal courts including the court below. In none of the following cases has the Court granted review to reconsider its holding in the *Switchmen's* case although frequently petitioned to do so. *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 141 F.2d 724 (D.C. Cir., 1944); *National Federation of Railway Workers, et al. v. National Mediation Board, et al.*, 141 F.2d 725 (D.C. Cir., 1944); *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F.2d 529 (D.C. Cir., 1948); *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 179 F.2d 446 (D.C. Cir., 1949); *Rose, et al.* v. *Brotherhood of Railway and Steamship Clerks*, 181 F.2d 944 (4th Cir., 1950) *cert. den.* 340 U.S. 857; *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line R. Co.*, 201 F.2d 36 (4th Cir., 1950); *Airline Dispatchers Association, et al.* v. *National Mediation Board, et al.*, 189 F.2d 685 (D.C. Cir., 1951) *cert. den.* 342 U.S. 849; *Decker, et al.* v. *Linea Aeropostal Venezolana, et al.*, 258 F.2d 153 (D.C. Cir., 1958);[3] *Airline Stewards and Stewardesses Association*

[3] In the *Decker* case, paragraph 8 of the complaint in the District Court raised the identical question here involved of the form of ballot used by the National Mediation Board in representation elections and the appeal from the District Court's decision dismissing the complaint specifically raised the issue. In that case the lower court held that under such circumstances the prohibition in the *Switchmen's Union* case is applicable (258 F. 2d at 154); in the cases under review it held the opposite without explanation or reference to its decision in *Decker* although the case was called to its attention.

v. *National Mediation Board, et al.*, 294 F.2d 911 (D.C. Cir., 1961) *cert. den.* 369 U.S. 810; *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 294 F.2d 905 (D.C. Cir., 1961) *cert den.* 368 U.S. 956; *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 314 F.2d 234 (D.C. Cir., 1962); *Flight Engineers' Inter. Ass'n.* v. *Eastern Airlines, Inc.*, 311 F.2d 745 (2d Cir., 1963) *cert. den.* 373 U.S. 924;

In the case of *Rose* v. *Brotherhood of Railway and Steamship Clerks*, 181 F.2d 944 (4th Cir., 1950) *cert. den.* 340 U.S. 857, the Court of Appeals had occasion to consider the same type of question here raised with respect to the form of the ballot used by the National Mediation Board. In that case a group of employees had sought to intervene in opposition to the Brotherhood's court suit to compel a rail carrier to meet and treat with it as required under the Railway Labor Act after certification by the National Mediation Board. These employees claimed that the form of the ballot used in the representation election had denied them an opportunity to vote against representation (p. 945). The district court had refused the intervention and the Court of Appeals sustained it, Chief Judge Parker stating (p. 946):

> "In the light of the decisions of the Supreme Court there can be no doubt that the effect of this statute was to vest in the Mediation Board exclusive jurisdiction over the certification of bargaining agents, the determination of bargaining units and the classification of employees for the purposes of bargaining. And it is equally clear that the exercise of discretion by the Board with respect to such matters is not subject to review by the courts."

The same issue here presented as to the validity of the ballot prescribed by the National Mediation Board became involved recently in the case of *Droggos* v. *National Mediation Board*, 227 F.Supp. 61 (N.D. Ohio, 1963). In denying an injunction sought on the grounds that the Board's ballot was invalid because it did not contain a blank to vote against any representation, the Court held that it was beyond its jurisdiction to review the Board's exercise of discretion under Section 2, Ninth of the Railway Labor Act. It also had before it but refused to follow the decision of the District Court here under review. On this point it said (p. 62):

> "Despite a contrary holding in Association for the Benefit of Non-contract Employees v. National Mediation Board, 218 F. Supp. 114, D.C., (1963), it is my view that no constitutional right, nor any fundamental right has been denied to the plaintiffs. I find that the Board, in selecting the form of ballot, was exercising the discretion committed to it by the statute to establish the rules to govern the election. This discretionary action is not reviewable under Switchmen's Union of North America v. National Mediation Board, supra, General Committee of Adjustment of Brotherhood of Locomotive Engineers etc. v. Missouri-Kansas-Texas Railroad Co., 320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76 (1943), and Rose v. Brotherhood of Railway and Steamship Clerks, supra."

In the face of the foregoing line of authority it is difficult for us to perceive how the District Court reached a contrary conclusion and even more difficult to understand why the Court of Appeals sustained it without opinion discussing the jurisdictional issue. Apparently Judge Youngdahl of the District Court relied principally upon the decision of *Airline Dispatchers Association* v. *National Mediation Board*, 189

F.2d 685 (D.C. Cir., 1951) *cert. den.* 342 U.S. 849 and the decision of this Court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), concluding that these cases were applicable to the issues presented rather than this Court's decision in *Switchmen's Union* because the question on the form of the ballot raised a serious issue of statutory construction (R. 142-143, and 169). We submit that these decisions have been misapplied to the action taken by the Board in the instant cases.

For example, the *Dispatchers* case raised the issue of whether the Board had the statutory power to investigate a dispute which involved employees outside the continental United States. The Court of Appeals for the District of Columbia Circuit held that the District Court had jurisdiction to review this question. Thus, the issue presented and decided was not the manner in which the Mediation Board performed its statutory functions under Section 2, Ninth of the Railway Labor Act, but rather the question of whether the Board had any power to act at all. There is manifestly a clear distinction to be drawn between judicial review of statutory authority to act at all and review of the manner in which admitted statutory authority is exercised. Simply characterizing the form of the ballot prescribed by the Board incident to its conduct of a

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[4] Insofar as the hearing on the craft or class issue is concerned, neither the District Court nor the Court of Appeals made any reference to the prayer of the complaint (R. 9) that the District Court order the Mediation Board to conduct a hearing to re-determine the appropriate composition of the craft or class and afford ABNE status as a party in interest at such hearing. In the permanent injunction issued by Judge Youngdahl, however, the Board was directed to further consider this question in the light of the Court's opinion and order with respect to the form of the ballot issue (R. 171).

representation election as amounting to an issue of statutory construction clearly does not establish jurisdiction which has been foreclosed by Congress "on any aspect of the problem" of certification proceedings under Section 2, Ninth.

Similarly, as stated by Circuit Judge Wright in his dissenting opinion in the court below (R. 182) "There is no *Leedom* v. *Kyne*, 358 U.S. 184 (1958), question here. It is not even suggested that the Board has acted contrary to a plainly and expressly defined statutory duty, nor has the Board here conceded that it has so acted, as in *Leedom*."[5]

Since the Court of Appeals merely affirmed on the basis of the opinion rendered by Judge Youngdahl of the District Court, there is no further light to be shed by reference to the Circuit Court's decision on the issue of jurisdiction.

Turning to the contentions advanced by ABNE and United, the entire argument seems to be a claimed deprivation of statutory rights which in their view rose to constitutional dimensions because of the Board's refusal to provide on its ballot a place to affirmatively vote "no representation". But neither United nor ABNE are able to cite any provision of the Railway Labor Act which gives an employee a right to affirm-

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[5] This Court has emphasized at the present term of Court that *Leedom* v. *Kyne* represents a narrow exception to preclusion of court review of certification proceedings where the National Labor Relations Board "attempted exercise of power that has been specifically withheld", that such exception must be confined within the "painstakingly delineated procedural boundaries of Kyne", and that it may not "be extended to permit plenary District Court review of Board orders in certification proceedings . . ." *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 481 (1964).

atively vote for "no representation". We believe that what has already been stated above with respect to misplaced reliance by the lower courts on *Airline Dispatchers Association* v. *National Mediation Board,* 189 F.2d 685 (D.C. Cir., 1951) *cert. den.* 342 U.S. 849 and *Leedom* v. *Kyne,* 358 U.S. 184 (1958) apply with equal force to these arguments of respondents in support of jurisdiction to review the Board's form of ballot used in certification proceedings under Section 2, Ninth of the Railway Labor Act.

With respect to the companion issue of the Board's denial of a hearing to re-determine the craft or class, little need be added to the issue of jurisdiction to what has already been stated on the question regarding the form of the ballot. It has already been mentioned above that the District Court in its order of injunction remanded this craft or class question to the Board for further consideration in the light of its decision that the statute required an opportunity by the employees to vote for "no representation". Despite the manner in which this "invitation" is extended by the District Court, it quite plainly constitutes the assertion of jurisdiction to review the manner in which the Board decides whether it is proper or improper to hold a hearing for the purpose of re-determining the composition of an already established craft or class of employees. As such, the District Court's order runs directly contrary to all the established precedents above cited and opens the door to judicial review of Board determinations as to the composition of a craft or class of employees.

II.

Jurisdiction Aside, the Action of the National Mediation Board in Denying the Requested Change in the Form of the Ballot and Declining to Re-determine the Craft or Class Constituted a Reasonable Exercise of Its Discretion Under Section 2, Ninth of the Railway Labor Act.

Even if this Court had not decided *Switchmen's Union* in 1943 and foreclosed from that time forward judicial review of representation proceedings of the Board under Section 2, Ninth of the Railway Labor Act, we submit that the Board's actions here under review constituted a reasonable exercise of judgment on subject-matter committed by Congress to its discretion and should not have been enjoined by the District Court.

The statute contains no express language instructing the Board how to resolve representation disputes under Section 2, Ninth. On the contrary, it does not even require that the Board conduct a representation election but gives the Board the freedom to utilize any "appropriate method" to determine the names of duly designated and authorized representatives of employees. Pursuant to this discretion, the Board has found it appropriate in a number of representation cases to certify bargaining representatives on the basis of signed authorization cards instead of holding an election entailing the use of a ballot.[8] Even prior to the *Switchmen's* decision such alternative method was expressly upheld as a proper exercise of the

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[8] For example, see Eleventh Annual Report of the National Mediation Board (1945) p. 14 where the Board states: "Certifications for 146 crafts were based on the results of secret elections, while 35 crafts were certified on the basis of checks of signed authorizations." Several recent decisions include NMB Case No. R. 3704 (Oct. 20, 1964) and NMB Case No. R. 3710 (Dec. 7, 1964).

Board's *discretion*, not that of the courts, *Brotherhood of Railway & Steamship Clerks* v. *Virginian R. Co.*, 125 F.2d 853, 857 (4th Cir., 1942). Since the freedom of choice is the Board's to determine representation through a secret ballot or by "any other appropriate method", such statutory grant of discretion clearly negates any restrictions, express or implied, on the form of the ballot to be used by the Board.

Consideration of other sections of the Railway Labor Act results in the same conclusion. Section 2, Fourth, 45 U.S.C. § 152, Fourth raises the question of whether representation elections should be determined by majority vote of those participating in the election regardless of the number of voters eligible to participate—which is the policy and practice of the National Labor Relations Board[7]—or only when a majority of those eligible actually participate and cast valid ballots in a craft or class election, which is the established practice of the Mediation Board. Because Section 2, Fourth provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act", the Mediation Board has consistently determined that a representative may be selected only through the participation of a majority of a craft;[8] otherwise the Board will not certify a representative. *Radio Officers Union* v. *National Mediation Board*, 181 F.2d 801 (D.C. Cir., 1950).

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[7] See RCA Manufacturing Co., 2 NLRB 173-177.

[8] Once a majority of the craft participate and cast valid ballots, however, the selection of a representative is by plurality vote. This interpretation of the statute was unanimously upheld by this Court in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 559-560 (1937).

Other sections of the Railway Labor Act provide no basis for the conclusion that the Board's form of ballot is in excess of its statutory authority or an abuse of its discretion. On the contrary, the Act speaks throughout in terms of *representatives* of employees designated and authorized to confer, negotiate, make, and maintain agreements. In the *Virginian* case, *supra,* this Court recognized that the Act was "aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them" (300 U.S. 515 at 548) and it expressly stated that the Act is "dependent for its operation upon the selection of representatives." (P. 560.)[9] See also this Court's reaffirmation of the observation in *International Machinists* v. *Street,* 367 U.S. 740, 760 (1961).

In the light of such a pervading philosophy of the Act to encourage the selection of employee bargaining representatives, the Board's refusal to expressly invite rejection of a representative on its ballot is consistent with, not in opposition to, the statutory purpose of the Railway Labor Act. In this respect it differs markedly from the procedure of the National Labor Relations Board whose ballot provides for a vote against representation (United R. 101) and whose statute, as amended in 1947, expressly preserves the right of employees to refrain from collective bargaining through representatives, 29 U.S.C. § 157. Thus, the practices of the Mediation Board and Labor Board differ just

[9] Respondent ABNE has stated unequivocally that it does not want its name on the ballot; that it does not wish to be a bargaining representative; and that its intent is to dissolve after it has served its purpose which can only be to see to it that the employees shall have no bargaining representative (R. 111).

as do the statutes under which each functions.[10] Each has followed different election procedures from the inception of their administration of the two statutes.[11] As pointed out by Board Member Francis A. O'Neill, Jr., in his affidavit before the District Court, the form of the ballot challenged by United and ABNE was formulated upon the creation of the National Mediation Board in 1934, has been utilized in conducting over 3400 representation elections among various crafts or classes of employees since that date, and is substantially the same form of ballot authorized by the United States Railroad Labor Board in 1921 (R. 161). As observed by Circuit Judge Wright in his dissenting opinion below:

> "In the 43 years since 1921, Congress has not indicated the slightest disapproval of the Board's election machinery—including its ballot. Moreover, no court, except the District Court here, in the ABNE case but *not* in the United case, has found this ballot unlawful."[12]

Finally, the legislative history of the 1934 amendments to the Railway Labor Act, of which Section 2,

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[10] *Brotherhood of R.T.* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 31 (fn. 2), 1957.

[11] *RCA Manufacturing Co.*, 2 NLRB 173-177; *Interlake Iron Corp.*, 4 NLRB 55, 61.

[12] Judge Wright dropped a footnote explaining that "The ABNE and United Cases were heard by different District Court judges." As a matter of fact, although the majority opinion of the court below states that it assumes that the United case was dismissed on the ground of lack of standing on the part of United (R. 177), it is equally credible to assume that the District Court dismissed the United case for lack of jurisdiction since this was the first ground of the motion (United R. 110) which Judge Matthews granted (United R. 144).

Ninth was a part, expressly confirms the fact that Congress intended to leave election rules and questions which might arise in the conduct of representation elections to the Board's discretionary determination. *Hearings before The Committee on Interstate and Foreign Commerce on H.R. 7650*, 73d Cong., 2d Sess., pp. 34-35 (1934). Certainly the form of a ballot and the composition of the craft of employees entitled to participate are well within the intended framework of such discretion.

III.

United Air Lines Lacks Standing Under the Railway Labor Act to Challenge the Mediation Board's Craft or Class Determination Or Its Form of Ballot

The majority of the lower court affirmed the District Court's dismissal of United's action to enjoin the Board's representation election. It did so on its "assumption" that the dismissal was on the ground of lack of standing on the part of United[13] which it decided "not to disturb" because the issue was a "close question . . . about which there is a dearth of authority" and because its decision in the ABNE cases "affords the relief concerning the form of the ballot which United sought." (United R. 148.)

Although Circuit Judge Wright concurred in the District Court's dismissal of United's suit, he did so on grounds additional to those set forth in the majority opinion. His dissenting opinion as a whole (United R. 149-154) demonstrates that in his view the District Court was without jurisdiction to entertain United's complaint under this Court's holding in the *Switchmen's* case, *supra*, and on the specific question of lack of standing he states as follows (United R. 153):

[13] But see footnote 12, supra.

> "United Air Lines lacks standing to challenge the Board's action. The purpose of the Railway Labor Act is to guarantee employees complete freedom to organize—freedom from employer interference. This Act was passed, as the Government asserts, 'to put an end to the harmful consequences of * * * individual dealing between large carriers and small employees. *Machinists* v. *Street*, 367 U.S. 740, 760; *Virginian Ry.* v. *Federation*, 300 U.S. 515, 553; *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 570. United's obligation under the Act is *not 'to interfere in any way with the organization of its employees.'* Railway Labor Act, § 2, Fourth. (Emphasis added.) And this obligation includes refraining from filing, or inspiring, litigation designed to block or delay representation elections conducted by the National Mediation Board."

The Association submits first, that the District Court lacked jurisdiction to entertain United's action for the reasons previously set forth in Point I of this argument; second, that the Mediation Board properly exercised its statutory authority in denying United's request to change the form of its ballot and hold a hearing to redetermine the craft or class of employees involved in the representation dispute for the reasons already discussed under Point II; and third, that, in any event, United lacked standing as a party in interest under the statute to challenge the craft composition or ballot form. This section of our argument is devoted to this third ground for opposing United's position.

As we understand United's position on the basis of its statements to the Mediation Board and arguments in the courts below, its claim of legal right to challenge the Board's craft composition is, in substance, grounded on its asserted economic interest in the way in which

the craft is formulated; its claim with respect to the Board's ballot arises from its interest in insuring that the certified representative is the "true representative" with which it must bargain.

The Mediation Board has consistently taken the position that a carrier cannot participate before it as a party in a representation proceeding under Section 2, Ninth because of the requirement under the Railway Labor Act that employees shall have complete freedom to organize without carrier influence, interference, or coercion.[14] On the other hand, the Board has frequently invited carriers to present their views when it holds a hearing to determine an appropriate craft or class. Consistent with this position the Board advised United in the instant proceedings that it was not a party to the representation dispute (United R. 65) which United subsequently admitted it was not (United R. 67). United contended, however, that it had a legitimate interest in the scope of the craft and form of ballot and a right to be heard thereon (United R. 67) and the Board replied that it would welcome an expression of the carrier's views even though it did not recognize it as a party to the representation dispute (United R. 85). The action of the Mediation Board thus cannot be attacked in this case on the ground that it refused to consider United's position.

Despite the foregoing facts of record, United contended in the courts below that it had standing to complain of the Board's refusal to re-determine an already constituted craft or class and the Board's form of ballot to be used in the representation election. If United's claims were recognized by the courts, then every carrier faced with a representation election could

[14] National Mediation Board's 28th Annual Report (1962) pages 31-32.

demand a hearing from the Mediation Board to determine the scope of the craft of employees involved regardless of any prior determinations of the Board and thus defeat the basic purpose of the Railway Labor Act to resolve disputes expeditiously and thereby avoid interruptions to commerce. For example, Section 2, Ninth contemplates that the Board shall designate a bargaining representative "within 30 days after receipt of the invocation of its service." In the present case United's demands upon the Board, supplemented by those of ABNE, have resulted in a delay of two years since the representation election was scheduled by the Board to be conducted on approximately December 19, 1962.

An analysis of the relevant provisions of the Railway Labor Act clearly justifies the Board's denial of standing in United to contest the issues raised by that carrier and supports its determination to get on with the job of resolving the representation dispute. Section 2, Fourth of the statute, 45 U.S.C. § 152, Fourth, totally excludes carriers from any interest or activity with respect to representation of employees for the purpose of collective bargaining under the statute. In pertinent part it states:

> "No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . ."

Similarly, Section 2, Third (45 U.S.C. § 152, Third) provides that representatives "shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall inter-

fere with, influence, or coerce the other in its choice of representatives." Further, Section 2, Ninth repeats the admonition and obligates the Mediation Board to conduct its representation election "in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercisd by the carrier."

The matters about which United here complains involve solely rights of the employees, not those of the carrier. In the *Virginian* case, *supra*, this Court held that a carrier may not so complain (300 U.S. 515 at 558).[15]

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals in No. 138 and No. 369 should be reversed and the judgment in No. 139 should be affirmed.

Respectfully submitted,

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Dated at Washington, D. C.
This 10th Day of December, 1964.

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[15] Unlike the National Labor Relations Act where employers as well as employees are expressly granted a role in the resolution of representation disputes and where either may file petitions (29 U.S.C. § 159), this is clearly not the case under the Railway Labor Act as shown above.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, PETITIONER

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

No. 139

UNITED AIR LINES, INC., PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

No. 369

NATIONAL MEDIATION BOARD, ET AL., PETITIONERS

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS

OPINIONS BELOW

The opinions of the district court in Nos. 138 and 369 (R. Nos. 138 and 369,[1] pp. 133–156, 166–170) are

[1] We shall cite the joint record in Nos. 138 and 369 as "R" and the record in No. 139 (which largely duplicates the record in Nos. 138 and 369) as "R. No. 139."

reported at 218 F. Supp. 114. The district court rendered no opinion in No. 139 (R. No. 139, p. 144). The single opinion of the court of appeals disposing of the three cases (R. 175–183) is reported at 330 F. 2d 853.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1964 (R. 184–185). The petitions for writs of certiorari were filed on June 1, 1964, in Nos. 138 and 139, and on August 10, 1964, in No. 369. The petitions were granted on October 12, 1964, and the cases were consolidated (R. 188–189; R. No. 139, p. 158).

QUESTIONS PRESENTED

1. Whether a district court may stay an order of the National Mediation Board directing a representation election upon the ground that the form of the ballot provided by the Board contains no specific space in which employees may expressly vote not to be represented by any union.

2. Whether a carrier has a right to participate in a National Mediation Board representation proceeding under Section 2, Ninth of the Railway Labor Act.

3. Whether a district court may enjoin the National Mediation Board from conducting a representation election on the ground that the Board should have granted the request of a group of employees opposed to any collective representation to redetermine, or hold a hearing on, the appropriate craft or class within which the election should be conducted.

STATUTE INVOLVED

Section 1, Fifth of the Railway Labor Act, 45 U.S.C. 151, Fifth, provides in pertinent part:

> Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.
>
> * * * * *

Section 2 of the Railway Labor Act, 45 U.S.C. 151a-152, provides in pertinent part:

> Sec. 151a. *General purposes.*
>
> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, or the

right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Sec. 152. *General duties.*

* * * * *

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives.

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in it choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall,

by interference, influence, or coercion seek in any manner to prevent the designation by its employees as thei epresentatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, * * *

* * * * *

Sixth. Conference of representatives; time; place; private agreements.

In case of a dispute between a carrier or carriers and its or their employees, aris-

ing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: * * *

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized represent-

atives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. * * *

STATEMENT

1. *The Proceedings before the National Mediation Board.*—In August 1962, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees filed with the National Mediation Board (the "NMB" or "Board") an application under Section 2, Ninth of the Railway Labor Act (45 U.S.C. 152, Ninth) to investigate a representation dispute among employees of United Air Lines ("United") in a craft or class known as "clerical, office, stores, fleet and passenger service employees" (R. 35–36).[2] In January 1947, after lengthy hearings in connection with an application to investigate an airline representation dispute, the NMB in case No. R–1706 determined that the group of employees thus defined constituted an appropriate single craft for collective bargaining purposes in the airline industry (R. 62–63, 77). United and other carriers were in-

[2] The Brotherhood amended its application in October 1962 to cover certain employees in that craft who had been excluded under the August application (R. 37).

vited by the Board to submit their views at these hearings, and United then took the position that these employees constituted an appropriate single craft (R. 63). At United the craft or class covers more than 12,000 non-technical ground employees of the airline, ranging from highly skilled office employees to janitors and laborers (R. 62, 130). Some of them had been represented by the International Association of Machinists (R. 36-37). After investigation, the Board determined that the Brotherhood had obtained a sufficient number of authorization cards under the Board's rules—35 percent of the employees in the craft or class—to warrant a finding that a representation dispute existed; and, on December 19, 1962, the Board scheduled an election by secret ballot to resolve the dispute (R. 37, 127).[3]

The Board proposed to use the same form of printed ballot which has been used under the Railway Labor Act continuously since 1934 (R. 45, 87, 161). The ballot contained the names of the labor organizations which are parties to the dispute—here the Brotherhood of Railway and Steamship Clerks and the International Association of Machinists (R. 127)—and a box below each name for the employee to check if he wished that organization to represent him. In addition, the ballot contained a space in which the employee could designate any other organization or individual he wishes to represent him (R. 127).

[3] Under Section 2, Ninth of the Act, the NMB may take a secret ballot or may "utilize any other appropriate method of ascertaining the names" of the representatives whom the employees designate.

The proposed ballot did not include a space in which an employee might expressly vote against any collective representation (R. 127). The Board's settled practice, however, was, and is, not to certify a representative, but to dismiss the application, unless an absolute majority of the employees eligible to vote cast valid ballots for a representative (R. 46). Under this procedure, an employee who does not wish to be represented may indicate his wishes either by casting a blank or invalid ballot or by refraining from voting (R. 46). The Board had explained this procedure in a general pamphlet describing its practices,[4] and in several of its annual reports.[5] Both United and the Association For the Benefit of Non-Contract Employees (see below, pages 10–11) were aware of the practice (R. 79–80, 109).

United objected to the Board's conducting an election among the employees of the craft or class established in 1947, and urged the Board to reconsider the appropriateness of the group (R. 56, 61–69). United suggested that the group should be divided into three separate crafts or classes and requested the Board to hold a public hearing in which United could participate and furnish evidence bearing on the question (R. 61–69, 72–76). United also protested the form of ballot, on the ground that it failed to

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[4] Administration of the Railway Labor Act by the National *Mediation Board. 1934–1937.* (G.P.O., 1958), pp. 16–18.

[5] See, *e.g.*, 14th Ann. Rep., National Mediation Board (1948), p. 8; 16th Ann. Rep., National Mediation Board (1950), p. 20; 18th Ann. Rep., National Mediation Board (1952), p. 29.

provide a specific space in which employees wishing no collective representation could so indicate (R. 79–86, 89–95).

After extensive correspondence with United, the Board declined to hold a hearing, to reconsider the craft or class, or to change the form of ballot (R. 70–72, 76–78, 86–88, 96–98). The Board pointed out that "the carrier is not a party to this representation dispute" (R. 71); that "no request for a review of the craft or class established by the Board's determination in Case No. R–1706, et al has been received from either organization party to NMB Case No. R–3590" (*ibid.*); and that the two organizations seeking to represent the employees were in agreement that the craft or class previously established was the "proper and appropriate grouping" of the employees (R. 77). In refusing to change the form of the ballot, the Board, after reiterating that the carrier was not a party (R. 86), stated that the type of ballot used was "best designed to ascertain the representation desires of a carrier's employees for the purpose of collective bargaining" (R. 87).

The election, which had been ordered in December 1962, was delayed because of the Board's controversies with United over the form of ballot and the appropriate craft or class, and because of United's refusal, during the controversy, to furnish the Board with the names of the employees involved (R. 61–100). In the interval, a group of United's employees formed an association to oppose collective representation, called the Association for the Benefit of Non-

Contract Employees ("ABNE") (R. 102–111). By the end of March, 1963, ABNE claimed a membership of 6,400 workers, more than half of the employees involved (R. 6, 18). ABNE sought to intervene in the representation proceedings. It requested the Board, on the basis of the information before it, to divide the craft or class previously established into three separate groups or to hold a hearing on the question; and to change the form of ballot so as to provide a specific space for employees affirmatively to vote against any collective representation (R. 102–105). ABNE stated that it was not seeking recognition as a bargaining agent, that it did not want its name on the ballot, and that it would be dissolved after "it has served its purpose" (R. 111).

The NMB denied ABNE's petition to intervene because the Association did not seek to represent employees as a collective bargaining agent (R. 14–18). The Board also denied ABNE's requests for a redetermination of the craft or class and for a change in the form of ballot (R. 14–18).

2. *The Court Proceedings.*—After the Board rejected its requests, United on February 12, 1963, filed a complaint in the district court seeking to enjoin the Board from conducting an election (1) unless it had held a hearing on the craft or class issue, and (2) unless the form of ballot permitted an employee to cast a vote against representation (R. 139, pp. 3–10). The district court (Judge Matthews) granted the Board's motion for summary judgment and dismissed the complaint (R. 139, p. 144). While the dis-

trict court gave no reasons, the court of appeals later assumed that the dismissal was for lack of standing (R. 177).

Shortly after the district court dismissed United's complaint, ABNE filed a suit against the Board seeking substantially the same relief (R. 4–9). The district court (Judge Hart) entered a temporary restraining order against conducting the election, which had been rescheduled for April 1963 (R. 128). Subsequently, the court (Judge Youngdahl) held that it had jurisdiction to determine the merits of the controversy over the form of the ballot (R. 140–146); that ABNE had standing to challenge the form of ballot (R. 146–147); that the ballot used by the Board violated the Railway Labor Act (R. 147–156); and that "an injunction should issue barring the Board from proceeding with the scheduled election unless the ballots are changed to provide a space in which the voters can vote for no representation" (R. 156).[6]

The court entered such an injunction (R. 132, 170–171). As to ABNE's request for a hearing on the craft or class, the court remanded the matter for reconsideration by the Board "in the light of the Court's conclusion that the Railway Labor Act * * * gives employees a right to have a ballot on which they

[6] In reaching this conclusion, the district court noted that since 1937 the National Labor Relations Board has used a ballot form which provides a space in which employees may indicate that they do not desire to be represented by any union. *Interlake Iron Corp.*, 4 NLRB 55. Excerpts from the Board's *Interlake* opinion explaining the basis for its action are set forth in Judge Youngdahl's opinion (R. 154–155).

may express a preference for no collective bargaining representation" (R. 176, 177).

The court of appeals in a *per curiam* opinion (Judges Miller and Bastian) affirmed the decisions in the *ABNE* case on the basis of the district court's opinion (R. 176–177). The court also affirmed the dismissal of United's suit on the ground that the affirmance in *ABNE* "affords the relief concerning the form of the ballot which United sought," and thus made it unnecessary to decide the "close question as to United's standing * * *" (R. 177).

Judge Wright, although concurring in the *United* case on the ground that United lacked standing (R. 182), dissented in the *ABNE* case because the "District Court was without jurisdiction to enjoin the National Mediation Board from conducting an election to resolve the representation dispute at United Air Lines. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943)" (R. 179).

3. *The Change in the Ballot.* Following the decision of the court of appeals and prior to the filing of the government's petition for certiorari, the Solicitor General held discussions with the NMB in which he suggesed that the Board should consider changing the ballot to remove any ambiguity as to how employees who opposed the designation of a representative might indicate their wishes. On November 6, 1964, the Board, in accordance with the suggestion, adopted an amended form of ballot on which the following statement appears directly above the name of the representatives seeking election:

757-778—64——2

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified.

The new form of ballot will be used in all elections held after November 23, 1964, and, unless the decisions below in the *ABNE* case are affirmed, will be used in the election in the present case. (The Board's notice of the change and the new sample ballot are set forth in the appendix, *infra*, pp. 63–65.) Thus, the question presented here with reference to the ballot is whether the Board has a statutory duty to put a specific "NO UNION" box on the ballot or has discretion to conclude that the form of ballot adopted on November 6 will best enable it to determine the question of representation.

SUMMARY OF ARGUMENT

I

A. 1. The Railway Labor Act does not require the National Mediation Board to use a ballot providing a spcific box in which to vote "NO UNION," Section 2, Ninth of the Act, which governs the conduct of representation elections, does not require the Board to use any particular form of ballot or, indeed, to use a ballot at all. The very flexibility of the election procedures indicates that the Board has broad discretion to determine what form of ballot is most appropriate to effectuate the purposes of the Railway Labor Act. The statute does not direct the Board to ascertain whether the employees wish to be represented collec-

tively, but to determine the representatives desired by a majority of the class or craft.

2. Since its establishment in 1934, the Board consistently has used a form of ballot which does not provide any space in which employees can vote explicitly for no representation. It has conducted more than 3,400 representation elections using this ballot, an average of more than 110 a year, and its experience has been that this ballot best effectuates the statutory policies. This consistent practice involves an expert judgment on a matter that "has been assigned primarily to the agency created by Congress to administer the Act" (*National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130), which is entitled to "peculiar weight [because] it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315).

3. The Board's new form of ballot plainly advises each and every employee how to express a preference for no collective bargaining. Assuming that there is some slight advantage to unions in having a ballot providing spaces for voting for particular unions but no box to vote for no union, that advantage is no more than the statute itself contemplates. The Act in general, and Section 2, Ninth in particular, assume that usually employees will designate representatives to act on their behalf in resolving disputes and arrang-

ing terms and conditions of employment. The form of the ballot asks employees the question upon which the statute directs the Board to ascertain their wishes, *i.e.*, whom do they wish to represent them. The statute was "aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees * * *" (*Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515, 548), and the language of Section 2, Ninth, assuming though not requiring the designation of representatives by a majority of the employees, reflects the Congressional policy of encouraging the development of collective bargaining.

B. Under *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, the Board's determination that a ballot which does not provide a box to vote "no union" will effectuate the purposes of the Act, is not subject to judicial review. This Court there held that the Board's resolution of a dispute over representation, even though it involved a question of statutory interpretation, was not judicially reviewable. This case is well within the *Switchmen's Union* doctrine even if that case is limited by *Leedom* v. *Kyne,* 358 U.S. 184, 188, since here the Mediation Board has not acted "contrary to a specific prohibition in the Act" nor "in excess of its delegated powers." There is no specific provision in the Act requiring a NO UNION box on the ballot, and the Board's "delegated powers" include determining, in the event of a dispute, the names of the representatives designated or authorized by a majority of the employees in the craft or class.

The essence of the *Switchmen's Union* doctrine is that questions such as those ABNE and United here sought to raise—the effect of the Board's type of ballot upon the exercise by employees of their right to select representatives—are for the Mediation Board rather than the courts. For Congress committed to the Board the responsibility for particularizing and applying to concrete situations the policies and general instructions contained in the Act. Thus to limit judicial review also furthers the aim of the Railway Labor Act to bring about prompt settlement of labor disputes in the transportation industry.

II

United sought to participate in the Board representation proceedings with respect to two issues: (1) the form of the ballot and (2) the craft or class within which the representation election would be conducted. The Board correctly refused to permit United to participate. The Railway Labor Act not only gives a carrier no right to be heard but affirmatively excludes it from participation. Unlike the National Labor Relations Act which provides for a governmental determination of an "appropriate" bargaining unit, the Railway Labor Act leaves determination of the units in which employees will organize exclusively to the employees provided only that there be a majority of an identifiable craft or class. The Mediation Board has a role only "if any dispute shall arise among a carrier's employees" as to the identity of the representative.

The Board's ruling is supported by the language of various provisions of the Act which stress the funda-

mental statutory principle that it is the employees who have the substantive legal right to determine the composition of the collectivity by their voluntary action, so that the question is none of the carrier's concern. Thus, Section 2, Ninth gives the Board no authority to adjudicate representation disputes between carriers and employees, but only such disputes among the employees themselves, and then only at the latters' request. That carriers were not intended to participate in the proceedings by which employees' representatives are chosen is further shown in the provisions of the Act designed to protect employees from carrier influence or interference.

The legislative history of the 1934 amendments of the Act, which added Section 2, Ninth, indicates that one of the purposes was to change the prior practice under which carriers had participated and thereby had influenced and interfered with employees in their choice of representatives. This view also is supported by the Board's consistent administrative interpretation that under the Act carriers have no right to participate in representation election proceedings.

III

It is unclear whether the order of the district court bars the Board from conducting an election without first holding a hearing on, or redetermining, the craft or class in which the election would be conducted. If the order does not stay the election, the Board does not challenge it.

But if the order does have that effect, it should be reversed. The Board's refusal to hold a hearing on

the craft or class did not constitute reviewable error; the statute does not require the Board to hold hearings in connection with Section 2, Ninth proceedings, and whether or not to hold a hearing is within the Board's discretion. Similarly, the Board's decision to adhere to the craft lines drawn in 1947 was within the agency's discretion and was not subject to judicial review. See *Switchmen's Union, supra,* where the Court refused to review Board rulings on craft determinations. Moreover, since the only reason for making craft or class determinations is to determine who are the representatives chosen by a majority for the purpose of collective bargaining, an organization of employees like ABNE, which opposes any collective bargaining, has no legally cognizable interest in the composition of the electorate.

ARGUMENT

I

A DISTRICT COURT IS NOT AUTHORIZED TO STAY AN ORDER OF THE NATIONAL MEDIATION BOARD DIRECTING A REPRESENTATION ELECTION UPON THE GROUND THAT THE BALLOT USED BY THE BOARD CONTAINS NO SPACE IN WHICH EMPLOYEES MAY EXPRESSLY VOTE AGAINST REPRESENTATION

In 1943 this Court held in *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, that the action of the National Mediation Board in certifying a collective bargaining representative under Section 2, Ninth of the Railway Labor Act is not judicially reviewable. Fifteen years later in *Leedom* v. *Kyne,*

358 U.S. 184, 188, the Court held that a district court may review a certification of a representative by the National Labor Relations Board where the Board's certification order was "made in excess of its delegated powers and contrary to a specific prohibition in the Act." Assuming that the *Kyne* principle also applies to certifications under the Railway Labor Act, the question here is whether the National Mediation Board acted "in excess of its delegated power and contrary to a specific prohibition in the [Railway Labor] Act" in refusing to provide a space on the ballot in which employees may mark a vote for no representation.[7]

We shall show first that the statute leaves the form of the ballot to be determined by the Mediation Board provided only that it is a reasonable method of carrying out the Board's statutory obligation under Section 2, Ninth. That obligation, in the case of a dispute "as to who are the representatives of the employees" is to certify to both parties and to the carrier "the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in

[7] We agree with the district court that ABNE has standing to challenge the form of the ballot. A group of employees wishing to vote against any collective representation is an, and perhaps the only, appropriate group to complain that the NMB's procedures do not properly allow employees opposed to representation to express their desires. Although ABNE had standing to raise the ballot question, we show below that it was not entitled to an injunction against holding the election.

the dispute." The language of the Act, its organic structure and legislative history, and its long-continued administrative interpretation all show that the Act does not require a ballot containing a specific box in which to vote against collective representation.

In particularizing and applying the policy of the Act in the performance of the foregoing duty the Board has wide discretion with which the courts will not interfere. The ballot now proposed to be used is reasonably directed toward resolving the question, "who are the representatives of such employees designated and authorized in accordance with the requirements of this Act." Accordingly, the case does not come within the narrow exception established by *Leedom* v. *Kyne* but is governed by the general rule that the conduct of representation proceedings by the Board, acting within its statutory authority, is not subject to judicial review.

A. THE RAILWAY LABOR ACT DOES NOT REQUIRE THE MEDIATION BOARD TO USE A BALLOT PROVIDING A SPECIFIC BOX IN WHICH TO VOTE NO UNION

Section 2, Ninth of the Railway Labor Act vests in the Mediation Board the power to determine disputes concerning the representation of employees. No instructions are laid upon the Board requiring it to proceed in any specific maner, or prohibiting resort to any procedure that it believes will facilitate the

performance of its statutory obligation. The only relevant mandate given to the Board is that—

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees * * *

then it shall be the Board's duty—

> to investigate such dispute and to certify to both parties * * * the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. * * *

Section 2, Ninth, then grants the Board incidental authority, but it does not, in terms, impose other legal duties. The reason seems plain. Congress intended to give to *the Board alone* full power to make the determination of "who are the representatives of such employees designated and authorized in accordance with the requirements of this Act." *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297. The phrase "designated and authorized in accordance with the requirements of this Act" is a reference to Section 2, Third, which provides that the employees' representatives shall be designated without interference by a carrier, and also to Section 2, Fourth, which provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * *."

It is hard to see how any other form of ballot could more directly ask the employees the very question the statute directs the Board to answer. The

statute does not tell the Board to ascertain whether the employees wish to be represented collectively. The statute directs the Board to determine who are the representatives desired by a majority of the class or craft. The proposed ballot follows the words of the statute: it asks every employee to indicate which of the putative representatives he prefers and allows him to write in the name of any representative which has not come to the Board's attention. In order to make the alternatives clear to every employee, the form of ballot promulgated November 6, 1964, also directs itself to the question, not embraced by the statute, what will be the consequence if a majority does not wish to designate a representative. The new form of ballot gives the prominent instruction that any employee who wishes there to be no representative should refrain from making a designation either by not voting or by casting a blank or spoiled ballot.

Not only does the form of ballot proposed conform to the only duty laid upon the Board but the language and legislative history, the consistent administrative interpretation and the policy of the Railway Labor Act show that the Board has no statutory duty to use a ballot with a NO-UNION box.

1. *The Language of Section 2, Ninth shows that the Board is not required to use A Particular Form of Ballot*

Section 2, Ninth, which governs the conduct of representation elections, does not require the Board to use any particular form of ballot. Indeed, the Board is not even required to use a ballot at all. The statute,

after providing that, upon request of either party to a representation dispute, the Board shall investigate such dispute and certify the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, further enacts:

> * * * In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. * * *

The Act thus leaves it to the Board to decide whether to use a secret ballot or some "other appropriate method of ascertaining the names of [the employees'] duly designated and authorized representatives." The Act nowhere specifies any particular form of ballot, and the very generality of the mandate indicates that the Board has broad discretion to determine what form of ballot is most appropriate to effectuate the purposes of the Railway Labor Act.

The legislative history of Section 2, Ninth (which was added to the Act in 1934) supports this view. At the hearings Commissioner Eastman, the draftsman of the 1934 Amendments, was asked a number of questions concerning problems that might arise in connection with the conduct of elections. These included such questions as what the effect would be if a majority of employees failed to participate, and whether, for example, "[i]f only 40 percent of the total number of employees voted and 21 percent voted for a certain representation, that 21 percent then would speak the will of the 100 percent?" Commissioner Eastman's response to all such questions was, in effect, that the proposed amendments did not provide the answers and that these were matters which the Board was to determine in connection with prescribing the procedures for the conduct of elections. See, Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., pp. 34–35.

Congress thus may fairly be said to have left it to the Board's discretion to fill in the procedural details of the elections, including the form of the ballot.

2. *The contemporaneous administrative interpretation, consistently followed for thirty years, shows that Section 2, Ninth does not require a ballot with a "no union" box.*

Since its establishment in 1934, the Board consistently has used a form of ballot which does not provide any space in which employees can vote explicitly for no representation (R. 45, 87). As one of its first

acts, the Board drafted a ballot which provides spaces where the employees can vote not only for the contending organizations but also for any other organization or individual he wants as a representative (*e.g.*, R. 112, 115). The Board selected this type of ballot "to permit the employees to secure some form of representation, as contemplated in the sections of the law quoted above [Section 2, Second and 2, Third]. It leaves to the majority of the employees of any craft or class full freedom to determine who shall be their representative for the purposes of the Act." *Administration of the Railway Labor Act by the National Mediation Board 1934–1957* (G.P.O. 1958), p. 19. This form of ballot, which gives the employees the right not only to choose among the organizations listed on the ballot but also to designate some one else, effectuates the statutory intent that employees are to have complete freedom to select their own representatives (see *infra*, pp. 44–49, 52–54, 56). "In many instances voters take advantage of this provision of the ballot to express their desire to be represented by some organization or individual other than those listed on the ballot. On occasions a majority of eligible voters have designated in this manner their representative for the purposes of the Railway Labor Act and the Board has so certified." *In the Matter of Representation of Employees of the Pan American World Airways, Inc.–Stock Clerks*, Case No. R–3262 (1958), 3 Determination of Craft or Class of the National Mediation Board (G.P.O. 1961), pp. 76, 79.

In the present cases the Board, in rejecting United's request that it provide a ballot containing a space to vote against representation, further explained the reasons for its traditional form of ballot (R. 87):

> * * * the form of ballot presently used was adopted by the Board in 1934 and has been used since that time as the form best designed to ascertain the representation desires of a carrier's employees for the purpose of collective bargaining. The blank line appearing on the present form of ballot affords an opportunity to the voter to vote for some organization or individual other than those named on the ballot, or he may refrain from voting at all if he so chooses. There is no compulsion that he vote for a contestant for representation. Introduction of a "yes" or "no" ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees for the purposes described in Section 2, First and Second of the Railway Labor Act * * *.

Another reason why the Board believes that a ballot providing a space to vote for no representative would contravene the policy of the Act was given in an affidavit by Mr. Francis A. O'Neill, Jr., who has been a member of the Board continuously since 1947 (R. 160). He stated (R. 164): "In the opinion of the National Mediation Board any requirement that the ballot used in a representation dispute be changed to provide a space in which the voters can vote for

no representation will tend to encourage the parties to a representation dispute to resort to self-help rather than to seek the services of the Board in resolving the representation dispute and will result in strikes and unrest in the industries covered by the Railway Labor Act which would not result were the normal form of ballot used."

In the 30 years since its existence, the Board, using this form of ballot, has conducted more than 3400 representation elections (R. 161, 164), or an average of more than 110 a year. In the first year of its existence, when the form of ballot was still novel, it conducted 58 elections. First Annual Report of the National Mediation Board, Table IV, p. 15. In the first ten years of its operations, the Board conducted 711 elections. Tenth Annual Report, Table 5, p. 19. The figures for recent years continue to show a large number of elections. The Board conducted 99 elections in fiscal year 1954 (Twentieth Annual Report, Table 2, p. 20); an average of 113 elections per year during the five-year period 1945–1949 (*ibid.*); and, in the most recent period for which published figures are available, the fiscal year ended June 30, 1963, 44 elections, of which 28 were in the railroad industry and 16 in the airline industry. Twenty-Ninth Annual Report, Table 3, p. 81.

In conducting these elections, the Board has had ample opportunity to test out in practice its original belief that its traditional form of ballot is "best designed to ascertain the representation desires of a carrier's employees for the purposes of collective bargain-

ing" (R. 87). Although "[o]ccasionally, it is suggested that the ballot used by the National Mediation Board does not permit a clear expression by a majority of eligible voters of their representation preference" (*Administration of the Railway Labor Act by the National Mediation Board 1934–1957,* pp. 18–19), the Board's experience has been to the contrary.

As we have noted (*supra,* pp. 21–25), both the language and the legislative history of the Act demonstrate that Congress intentionally left it to the discretion of the Board to determine the most appropriate procedures for conducting representation elections under Section 2, Ninth, including whether or not to use a ballot and, if so, what form it should take. The Board's settled view, which it has consistently applied during the 30 years that it has been administering Section 2, Ninth, has been that a ballot which does not provide any space for voting for no representation best effectuates the statutory policies. That conclusion thus involves an expert judgment on a matter that "has been assigned primarily to the agency created by Congress to administer the Act" (*National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111, 130). The Board's consistent practice is entitled to "peculiar weight [because] it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315; see, also, *United States* v.

American Trucking Ass'ns, 310 U.S. 534, 549; *Federal Trade Commission* v. *Mandel Brothers*, 359 U.S. 385, 391. It also involves a practice continued without legislative question, for over 30 years.

3. The proposed form of ballot will effectuate the policies of the Act

The district court held that the form of ballot which the Board *then* proposed to use in the election at United was unlawful because it failed to give employees who wished to oppose any collective representation an opportunity to express their desire. The opportunity was present because failure to cast a valid ballot would be treated as the equivalent of a vote against representation; but it could be argued that this method of opposing any representation was insufficiently publicized because the Board did not announce it on the ballot and employees were unlikely to read the lengthy rules for conducting elections in which it appeared. The ground for criticism has been eliminated. The Board, upon considering the representation of the Solicitor General that in his opinion the old ballot was unfair, promulgated a new form of ballot which, at the very moment of voting, plainly advises each and every employee how to express a preference for no collective bargaining. There is nothing in the present procedure that requires employees to designate a representative or hides the opportunity to reject all the contending unions.[8]

[8] The district court cited (R. 152) as a reason for requiring a NO UNION box on the ballot a hypothetical case in which 4,000 employees voted for Union A, 3,000 employees voted for

If the current form of ballot is to be attacked, it can only be on the ground that it somehow favors the designation of a union representative over the rejection of all collective bargaining. Whether that is true and, if so, how great is the advantage are questions of fact for the expert administrative body to decide. It is far from obvious that it is appreciably easier to mark the box designating one of the unions than it is to cast a blank ballot, spoil the ballot, or cast no vote. There is no obviously great psychological advantage to the unions in having boxes on the ballot in which one can be designated as representatives whereas an em-

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Union B and 5,000 failed to vote. The court expressed the fear that, if the present form of ballot were used, that would be a valid election and Union A would be certified. We submit that the example raises questions concerning the conclusions to be drawn from the facts, not doubts about the propriety of the ballot. If refraining from voting is a widely-known method of opposing all representation, then possibly the failure of 5,000 employees to vote should be taken into account in deciding whether Union A has been designated by a majority. At the same time it may be argued that the supporters of Union B voted for collective bargaining and therefore may be taken to prefer Union A to no union. Such questions concerning the conclusions to be derived from various tallies, the conduct of run-off elections and what constitutes a majority have been the subject of frequent consideration under both labor acts. See, *e.g.*, *National Labor Relations Board* v. *Standard Lime & Stone Co.*, 149 F. 2d 435 (C.A. 4), certiorari denied, 326 U.S. 723; *Radio Officers' Union* v. *National Mediation Board*, 181 F. 2d 801 (C.A.D.C.); *Aluminum Company of America*, 12 NLRB 237; *Coos Bay Lumber Company*, 16 NLRB 476; *R. K. Le Blond Machine Tool Co.*, 22 NLRB 465; 2d Ann. Rep., National Mediation Board (1936), p. 11; 14th Ann. Rep., National Mediation Board (1948), pp. 8–9; 16th Ann. Rep., National Mediation Board (1950), pp. 20–21; 29th Ann Rep., National Mediation Board (1963), p. 36.

ployee who opposes collective bargaining expresses his will by following the instruction, plain on the face of the ballot, instead of marking a box. We may assume, however, that there is some advantage, indeterminate in degree, because the form of ballot seems to carry some slight assumption that the employees will want to designate one of the unions. That advantage, we submit, is no more than the statute itself contemplates.

(a) The Railway Labor Act, in general, and Section 2, Ninth, in particular assume that in the normal course of events employees will designate representatives to act on their behalf in resolving disputes and arranging terms and conditions of employment. The proposed form of ballot, if it does that, certainly does no more. Neither the Act nor the ballot requires the designation of representatives; and the instruction on the ballot makes the absence of any such requirement clear.

Indeed, the form of the ballot corresponds so closely to the language of the Act that invalidating the ballot would virtually convict the Board of violating the Act by asking employees the very question upon which the statute directs the Board to ascertain their wishes. A dispute arose among United's employees "as to who are the representatives of such employees" because both BRC and IAM claimed to be the representative. Section 2, Ninth, required the Board to certify "the name or names of the individuals or organizations that have been designated and authorized to represent the employees" by a majority in the craft or class. The statute says nothing about asking the

employees whether a majority wish to have a representative. The Board, following the statute, put the question to each employee whether he wished to designate BRC or IAM, the only contending claimants, with a view to certifying whichever, if either, the majority might designate.

Whatever presumption that procedure created in favor of designation is implicit in the statute itself.

(b) The language of Section 2, Ninth, assuming though not requiring[9] the designation of representatives by a majority of the employees, reflects a Congressional policy of encouraging the development of collective bargaining.

Congress recognized that collective bargaining is the appropriate and usual method for settling labor disputes between carriers and their employees, and intended to encourage the latter to select representatives through whom they could engage in such negotiations. Section 2, Second, *supra*, p. 4, provides:

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[9] Commissioner Eastman so testified. Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., p. 57.

In the district court government counsel stated (R. 144–145) that the Board "has taken the position that the language of the statute requires a representative" and that employees "just don't have a right to vote for no representation." But the Board's consistent practice of refusing to certify a representative unless a majority of all the employees in the craft or class (as distinguished from a majority of those voting) vote for representation would seem to refute that statement. In any event, the Board presently does not hold the views that government counsel ascribed to it in the district court—as its recent action in changing the form of the ballot so clearly demonstrates (see *supra*, pp. 13–14, 23).

"All disputes between a carrier or carriers and its or their employees *shall be considered,* and, if possible, decided, with all expedition, in conference *between representatives designated* and authorized so to confer, respectively, by the carrier or carriers and *by the employees* thereof interested in the dispute." (Emphasis added.) Section 2, Fourth (*supra,* p. 5) similarly contemplates collective representation, since it gives employees the "right" to "organize and bargain *collectively* through *representatives of their own choosing,*" with the majority having the authority to determine "who shall be the representatives" (emphasis added). Section 2, Sixth (*supra,* pp. 5–6), reflects the same Congressional approval of collective representation. It provides that where there are disputes arising out of grievances or out of the interpretation or application of agreements, "it shall be the duty of the *designated representative* * * * of such carrier * * * and *of such employees*" to confer within ten days after notice of such dispute. (Emphasis added.) Finally, the election machinery of Section 2, Ninth, is designed to determine "who are the representatives of such employees" and to "ascertain * * * the names" of the employees' representatives.[10]

[10] See also Section 6 (45 U.S.C. 156), providing that "Carriers and *representatives of the employees* shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference *between the representatives* of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of such notice. * * *" (Emphasis added.)

Commissioner Eastman pointed out during the hearings that "employees cannot deal on equal terms with the employer unless they organize. They must deal collectively rather than individually." Hearings on S. 3266, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., p. 146. He further stated that "The purpose [of the bill] is to protect collective bargaining * * *." *Id.*, p. 148.

In *Virginia Ry.* v. *System Federation No. 40,* 300 U.S. 515, 547, this Court, referring to "the plain purpose made manifest throughout the numerous provisions of the [Railway Labor] Act," stated: "Its major objective is the avoidance of industrial strife, by conference between the authorized representatives of employer and employee." The Court pointed out (p. 548) that the statute was "aimed at securing settlement of labor disputes *by inducing collective bargaining* with the true representative of the employees * * *" (emphasis added).

Similarly, in *Machinists* v. *Street,* 367 U.S. 740, the Court, after pointing to the powers which Congress gave railway labor unions under the Act and the provision whereby national unions selected the 18 employee members of the National Railroad Adjustment Board,[11] stated (p. 760):

> In sum, in prescribing collective bargaining as the method of settling railway disputes, in conferring upon the unions the status of exclusive representatives in the negotiation and administration of collective agreements, and in giving them representation on the statutory

[11] Section 3, First (a) (45 U.S.C. 153, First (a)).

> board to adjudicate grievances, Congress has given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry. "It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies * * *. The assumption as well as the aim of that Act [of 1934] is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other."

Thus, unlike the National Labor Relations Act which, as amended in 1947, expressly preserves to employees the right to refrain from collective bargaining (Section 7, 29 U.S.C. 157), the Railway Labor Act has no comparable provision. While, as we have noted, such employees are not required to engage in collective bargaining, the basic plan and purpose of the latter Act is to encourage and facilitate employees in selecting representatives for that purpose.[12] To the extent that the proposed form of

[12] The district court noted (R. 154–155) that in conducting representation elections the National Labor Relations Board since 1937 has used a ballot which provides a place for employees to vote against any representative But this fact does not establish that the NMB, operating under a statute which, unlike the National Labor Relations Act, reflects a Congressional purpose to encourage and facilitate the selection of representatives, was required to use the same form of ballot in conducting its elections.

ballot has that tendency, it corresponds to the policy of the Act.

B. THE MEDIATION BOARD'S DETERMINATION THAT THE FORM OF BALLOT NOW PRESCRIBED WILL ENABLE IT TO DETERMINE THE QUESTION OF REPRESENTATION IN ACCORDANCE WITH SECTION 2, NINTH IS NOT SUBJECT TO JUDICIAL REVIEW

In *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, this Court construed the Railway Labor Act as precluding judicial review of the Board's certification of a collective bargaining representative under Section 2, Ninth. Although the dispute in *Switchmen's Union* involved a question of statutory interpretation—whether the Act permitted the division of crafts of a single carrier into smaller units for collective bargaining purposes—and although it was asserted that the NMB's negative answer to that question violated the Act, the Court held that the Board and not a court was the tribunal intended finally to resolve such questions when they arose in a certification proceeding. The Court stated, 320 U.S. at 300: "We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate." Examining the statute and its history, the Court concluded (p. 305): "the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law."

The Court took particular note of the sensitive and volatile nature of representation contests among em-

ployees; and of the extreme care Congress had taken to define the Board's limited role in such disputes. It concluded that "[w]here Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say *on any aspect* of the problem, it would have made its desire plain" (320 U.S. at 303, emphasis added).[13] The Court also relied upon the fact that, although the Act provides for judicial review of rulings of other agencies, such as decisions of the National Railroad Adjustment Board (Section 3, First (p)) and of arbitration boards (Section 9), it makes no provision for judicial review of NMB determinations.[14]

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[13] The Court's reference to the pains taken by Congress to protect the NMB in explosive situations, was to the provision in Section 2, Ninth, giving the Board the option of appointing a committee of three neutral persons who would designate the employees who were eligible to participate in the election. This provision was inserted in the 1934 amendments at the suggestion of the Chairman of the Board of Mediation (the NMB's predecessor), because of concern that if the Board had to decide heated disputes between unions as to eligibility to vote (*i.e.*, craft questions), the Board's role as a mediation agency might be adversely affected. See, *e.g.*, Hearings on S. 3266, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., pp. 134–135.

[14] The legislative history of the 1934 amendments to the Act confirms the inference that, by providing for judicial review in other areas but omitting any provision for review of NMB determinations, Congress intentionally sought to preclude judicial review of the latter. See, Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., pp. 41, 59–61.

The present case is well within the *Switchmen's Union* doctrine even if that case is limited by *Leedom* v. *Kyne*, 358 U.S. 184, 188. Certainly, the Mediation Board here has not acted "contrary to a specific prohibition in the Act" (*id.* at 188); there is no specific provision requiring a "No Union" box on the ballot as opposed to other methods of indicating opposition to union represenation. Nor can it be said that the Mediation Board acted "in excess of its delegated powers." The Act delegates it power, in the event of a dispute, to determine the names of the represenatives designated or authorized by a majority of the employees in the craft or class. That is all that the Board has sought to do.

The very arguments attacking the proposed form of ballot indicate that the questions that ABNE and United sought to raise are not open to judicial review. Unable to point to any specific prohibition which the Board violated, they are forced to argue in terms of broad generalities contrasting what they say will be the effect of the proposed form of ballot upon the employees with what they say are the conclusions to be drawn from the general provisions and policies of the Act. It is the essence of the *Switchmen's Union* doctrine that such questions are for the Mediation Board rather than the courts. The effectiveness of the proposed ballot in obtaining a free expression of choice, the way it will affect the employees who are to vote in the election, the usefulness of the ballot in emphasizing real as opposed to theoretical choices, are all questions for the agency to determine upon

the basis of its experience and knowledge of the problem. Congress also committed to the Board the responsibility for particularizing and applying to concrete situations the policies and general instructions contained in the Act. We submit that for the reasons stated above the proposed form of ballot will, in fact, effectuate the policy of the Act (see pp. 30–37, *supra*), but whether we be right or wrong in that respect, certainly the Board could reasonably conclude that the ballot was an appropriate method of carrying out the task committed to it by Section 2, Ninth.

Since the Board's proposed method of determining the names of any representative designated by a majority of the employees was not an unreasonable construction of its mandate, in the light of the policies of the Act, there is no room for judicial intervention. Only last Term this Court indicated that the *Kyne* exception is a "narrow" one and that "district court review of orders entered in certification proceedings" may be had only in "extraordinary circumstances." *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 474–480, 481.[15]

[15] Until the decision in the present cases, the lower federal courts repeatedly and consistently had applied *Switchmen's Union* to bar judicial review of determinations of the NMB under Section 2, Ninth. See, *e.g.*, *Radio Officers' Union* v. *National Mediation Board*, 181 F. 2d 801 (C.A. D.C.); *Rose* v. *Brotherhood of Railway and Steamship Clerks*, 181 F. 2d 944 (C.A. 4), certiorari denied, 340 U.S. 851; *Rutas Aereas Nacionales* v. *Edwards*, 244 F. 2d 784 (C.A. D.C.); *UNA Chapter, Flight Engineers' International Ass'n* v. *National Mediation Board*, 294 F. 2d 905 (C.A. D.C.), certiorari denied, 368 U.S.

Thus to limit judicial review furthers the aim of the Railway Labor Act to bring about prompt settlement of labor disputes in the transportation industry. Section 2(4) (*supra*, p. 4) specifies that one of the purposes of the Act is "to provide for the prompt * * * settlement of all disputes * * *." Section 2, Ninth furthers this purpose by making it the Board's duty to investigate a representative dispute and "to certify to both parties, in writing, *within thirty days* after the receipt of the invocation of its services the name or names of the * * *" representatives

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956; *Air Line Stewards and Stewardesses Association* v. *National Mediation Board*, 294 F. 2d 910 (C.A. D.C.), certiorari denied, 369 U.S. 810; *Flight Engineers' Int'l Ass'n* v. *Eastern Air Lines*, 311 F. 2d 745 (C.A. 2); *WES Chapter, Flight Engineers' Int'l Ass'n* v. *National Mediation Board*, 314 F. 2d 234 (C.A. D.C.).

In the *Rose* case, *supra*, the court refused to consider the merits of the same attack on the form of the ballot made in the present cases. *Rose* was a suit by a union certified by the Board seeking to compel a carrier to bargain with it. A group of employees sought to intervene on the ground, *inter alia*, that the union had no right to represent them "because the ballot provided for the secret election did not afford the employees an opportunity to vote against collective bargaining * * *." 181 F. 2d at 945. In an opinion by Judge Parker, the court of appeals upheld the dismissal of their petition to intervene, on the ground that under *Switchmen's Union* the Railway Labor Act gave the NMB exclusive and unreviewable jurisdiction over the certification of bargaining agents and the determination of bargaining units. See 181 F. 2d at 946. See also, *Droggos* v. *National Mediation Board*, 227 F. Supp. 61 (N.D. Ohio), where the court in refusing to enjoin the holding of an election among airline employees because of the asserted invalidity of the ballot, disagreed with the present cases and followed *Rose*.

selected (emphasis added). See also, *Switchmen's Union, supra,* 320 U.S. at 303, where the Court quoted Commissioner Eastman's statement that one of the objectives of the Act was to "get the matter settled."

In the present cases, more than two years have elapsed since the Brotherhood invoked the Board's services in the summer of 1962. Although the Board then found that a representation dispute existed, that dispute has not been resolved. There has been no election, and no certification of any representative or Board determination that a majority of the employees involved do not want representation. More than half of this delay is attributable to the court proceedings challenging the form of the ballot and the Board's refusal to redetermine the appropriate craft or class.

If this Court upholds the Board's actions, by the time an election is held there will have been a delay of almost three years. The statute, however, requires the Board to investigate the dispute and certificate the representative (if one is selected) within 30 days after it receives the request for investigation. The present cases thus dramatically illustrate the serious delays that are likely to result if the courts are permitted to enjoin the Board from conducting an election because of alleged deficiencies in the ballot or other alleged procedural irregularities—delays which, as we have shown, Congress sought to avoid in the Railway Labor Act.

II

A CARRIER HAS NO RIGHT TO PARTICIPATE IN A REPRESENTATION PROCEEDING UNDER SECTION 2, NINTH OF THE RAILWAY LABOR ACT

United sought to participate in the Board proceedings with respect to two issues: (1) the form of the ballot, and (2) the craft or class within which the representation election would be conducted. The district court gave no reasons for dismissing United's suit to enjoin the election (R. No. 139, p. 44). The court of appeals assumed that such dismissal was because United lacked standing (R. 177), and affirmed on the ground that its affirmance of the order in the *ABNE* case "affords the relief concerning the form of the ballot which United sought," and therefore made it unnecessary to decide the "close question" of United's standing to maintain its suit (R. 177). The district court's order in the *ABNE* case, however, did not give United all the relief it sought. Although the court in substance required the Board to use a ballot which provides a space for voting for no representation, the order gave United no relief with respect to its claim that it was entitled to a hearing before the Board on the appropriate craft or class.[16] Consequently, we agree with United that the question whether a carrier has a right to participate in employee representation proceedings under Section 2,

[16] As we show below, pp. 58–59, it is also uncertain whether the order in *ABNE* requires the Board to give ABNE a hearing on the craft or class issue.

Ninth of the Act, is presented for decision in this litigation.

United argues that it has a right to participate in a Section 2, Ninth proceeding because (1) it has an "economic interest" in "the composition or structure of a collective bargaining unit of its employees." (Pet. No. 139, p. 13) and (2) since it must bargain with the certified representative, it has an interest in insuring that the certified representative is the " 'true representative' of the majority of the employees" (*id.*, pp. 24, 26). Our answer is that the Railway Labor Act not only gives the carrier no right to be heard but affirmatively excludes it from participation. That course was the logical consequence of the substantive policy of the Railway Labor Act; to require carriers to bargain with representatives freely selected by a majority of *any* craft or class of employees (Section 2, Fourth). Unlike the National Labor Relations Act which provides for a governmental determination of an "appropriate" bargaining unit, the Railway Labor Act leaves determination of the units in which they will organize exclusively to the employees, provided only that there be a majority of an identifiable craft or class. The Mediation Board has a role only "[i]f any dispute shall arise among a carrier's employees" as to the identity of the representative.

While determining what organization is the majorityy choice requires the Board to resolve disputes concerning the constituency, it does not alter the fundamental substantive policy of giving the employees the right to select the form of employee

organization, *i.e.* the composition of the group which will bargain as a collectivity. Thus, the rule denying employers a right to be heard in representation proceedings is simply the procedural corollary of the substantive rights conferred upon the employees by the Railway Labor Act. The decisions and principles determining standing to be heard under other regulatory statutes in controversies in which the intervenor has a legally recognized interest are inapplicable under this statute, which confers the substantive right involved in the hearing upon the employees alone.

We now show that this interpretation of the Railway Labor Act is supported by the plain meaning of the words, the legislative history and the original and settled interpretation of the Mediation Board.

A. THE PLAIN MEANING OF THE WORDS SHOWS THAT A CARRIER HAS NO RIGHT TO PARTICIPATE IN A REPRESENTATION PROCEEDING

Section 2, Fourth of the Railway Labor Act contains the key provisions with respect to the choice of representatives and composition of the collectivity or bargaining unit for which the representatives will act:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this [Act].

The second sentence, especially the reference to the "majority of *any* craft or class," makes it plain that the forms of organization, *i.e.*, the type and juris-

diction of the labor union, are to be determined by the employees alone without outside interference. Were there doubt upon the point it would be removed by a proviso in Section 1, Fifth, which provides—

> That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

At the time of the 1934 amendments, as today, the Interstate Commerce Commission maintained an elaborate occupational classification of railway employees. The proviso makes it clear that the classes or crafts according to which railway employees are to be organized for purposes of collective bargaining are to be determined "by their voluntary action" and not by government classifications. Similarly, the reference to "the jurisdiction * * * of such employee organizations" refers to the groups which they claim the right to organize and for which they will bargain.

The result is that once a majority of the employees in any self-determined group that can fairly be described as a "craft or class" determines who will be its bargaining representative, the carrier-employer has an absolute duty to bargain with that representative in behalf of the group regardless of whether the carrier or anyone else thinks that the group is an in-

appropriate bargaining unit. The union may maintain a suit in equity to compel the carrier to perform its statutory duty. *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515. There is no provision, however, for any administrative determination concerning the appropriateness of the bargaining unit. That is because its composition is left entirely to the wishes of the employees, provided that they can fairly be described as "any craft or class."

Section 2, Ninth takes account of the fact that there may be differences among employees with respect to voluntary self-organization and the selection of representatives. In such disputes there often is rivalry not only concerning the choice of representatives but also concerning the scope of the crafts or classes in which the employees will organize for the purposes of collective bargaining. In the latter event the Mediation Board will have to define the constituency from which a majority representative will be chosen. Such a controversy, however, is a conflict between rival groups of employees over which group will determine how the employees will exercise the employee right to determine the composition of the collectivity with whose representatives the carrier must bargain. Indeed, even at this point the statute says nothing about the Board's determining the appropriate bargaining unit. The only power it is given is to decide "who may participate in the election" (Section 2, Ninth). And obviously, there is no occasion for the carrier to be given a hearing in a controversy between rival groups of employees over the exercise of an employees' right.

The words of the Act pertaining to the procedure in representation proceedings under Section 2, Ninth reflect the fundamental principle that it is the employees who have the substantive legal right to determine the composition of the collectivity by their voluntary action, so that the quesion is none of the carrier's concern. Section 2, Ninth gives the Board no authority to adjudicate representation disputes between carriers and employees, but only such disputes among the employees themselves, and then only at the latter's request. In adjudicating such employee disputes, the Board's function is limited to acting as a referee and to finding as a fact whom the employees want to represent them. See *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 304–305.

Section 2, Ninth provides that "[i]f any dispute shall arise *among a carrier's employees* as to who are the representatives of such employees * * *, it shall be the duty of the Mediation Board, upon request of *either party to the dispute*, to investigate such dispute and *to certify to both parties* * * * the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, *and certify the same to the carrier*" (emphasis added). The words make it plain that the carrier has no standing to invoke the Board's services and that the carrier is not a "party"; indeed, the draftsman placed the words "carrier" and "party to the dispute" in virtual opposition. As Commissioner Eastman explained at the Congressional hearings, "if an organization claims to represent

the employees and appears with reference to any labor dispute and *there are no employees contesting its right* to appear for them, there would be no need for [the] machinery [of Section 2, Ninth] to determine the matter." Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. p. 56 (emphasis added).

Similarly, with regard to craft or class determinations, it is only where there is a dispute among employees as to the majority representatives that the machinery of Section 2, Ninth comes into operation. The Railway Labor Act leaves it to employees to determine along what lines they shall organize. As this Court pointed out in *Switchmen's Union, supra,* 320 U.S. at 301, the Board makes craft or class determinations only as an incident to resolving controversies among employees as to their representatives. Even in such cases the statute avoids such phrases as "craft or class" and "appropriate bargaining unit." The Board is simply authorized to designate, when it holds an election, "who may participate in the election." The choice of words emphasizes the policy of leaving the composition of bargaining units to the employees themselves except where strictly necessary to the machinery for resolving their disagreement.

In these respects, the basic design of the Railway Labor Act is quite different from that of the National Labor Relations Act. An employer subject to the National Labor Relations Act is under no duty to bargain with employee representatives unless they have been selected by a majority "in a unit appropri-

ate for such purposes"; and the employer always has the right to challenge the appropriateness of the unit (Section 9(a)). The National Labor Relations Board is authorized to decide in each case "the unit appropriate for the purposes of collective bargaining." Section 9 of the National Labor Relations Act as amended in 1947 (29 U.S.C. 159), empowers the National Labor Relations Board to adjudicate representation disputes between employers and employees as well as among employees. Section 9(c)(1)(B) specifically authorizes both employers and employees or their representatives to file with the Board a petition for a representation election. In determining whether a question of representation affecting commerce exists, the Board is directed to apply the same principles no matter who files the petition (Section 9(c)(2)). The National Labor Relations Act thus gives the employer a statutory privilege to insist upon an "appropriate unit" and consequently a far different role in representation proceedings than under the Railway Labor Act.

Further support for the view that Congress intended to deny carriers any part in the proceedings by which employee representatives are chosen is found in the provisions of the Act designed to protect employees from carrier influence or interference. Section 2(3) (*supra*, p. 4) states that one of the purposes of the Act is "to provide for the complete independence of carriers and of employees in the matter of self-organization * * *." Section 2, Third (*supra*, p. 4) provides that representatives "shall

be designated by the respective parties *without interference, influence,* or coercion by either party over the designation of representatives by the other; and neither party shall in *any way interfere with, influence,* or coerce the other in its choice of representatives" (emphasis added). Section 2, Ninth directs the NMB to conduct representation proceedings "in such manner as shall *insure* the choice of representatives by the employees *without interference, influence,* or coercion exercised *by the carrier*" (emphasis added).

While allowing carriers to participate in employee representation proceedings may not cause "coercion," it may result in "interference" or "influence." For example, assume that two unions are seeking to represent a large group of employees; that union A asserts that there should be two crafts or classes in which separate elections should be held, since it believes that it has a majority in one but perhaps not in the other; and that union B, which believes that it represents a majority of the entire group but not of one of the subdivisions, insists that the entire group should be a single craft or class. To permit the carrier to participate and support A's position on this issue could influence the employees to choose union A as their representatives, and might even constitute interference in the selection process. Similarly, a carrier which is permitted to participate in the representation process in order to urge that the ballot contain a NO UNION box, would be influencing employees to vote against representation. As we show below, one of the major purposes of the 1934 amend-

ments was to eliminate all carrier influence in the processes by which employees selected their representatives.

B. THE LEGISLATIVE HISTORY SHOWS THAT A CARRIER HAS NO RIGHT TO PARTICIPATE IN A REPRESENTATION PROCEEDING

The language of the statutory provisions discussed above is the result of experience followed by mature deliberation. While the Railway Labor Act as enacted in 1926 prohibited carriers from interfering with their employees' selection of a collective bargaining representative, it contained no machinery for enforcing this provision. During the Congressional hearings on the 1934 Amendments it was brought out that carriers did interfere with the employees' choice of representatives in various ways, including establishing "company unions," limiting employees' freedom of choice in their selection of representatives as a condition for employment, discharging or threatening to discharge employees joining a union, providing financial assistance or other support for favored unions, refusing to recognize as collective bargaining representatives persons not in the carrier's employ, and participating in the proceedings in which employees selected representatives. See, Hearings on S. 3266, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., pp. 13, 28–29, 36–37, 51–52, 149–151, 164–165; Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., pp. 23–26, 32–33, 34, 38–39, 78–79, 85, 92, 110–113; Hearings on H.R. 9861, House Committee on Rules, 73d Cong., 2d Sess., pp. 10–11, 15.

One of the two chief objectives of the 1934 Amendments, 48 Stat. 1186, was to end those practices by strengthening the prohibitions against carrier interference and influence in representative proceedings. Senate Hearings, *supra,* pp. 28–30; House Hearings, Committee on Interstate and Foreign Commerce, *supra,* pp. 22, 43, 78; House Hearings, Rules Committee, *supra,* pp. 10, 20–21; Senate Report No. 1065, 73d Cong., 2d Sess., pp. 1–2.[17]

The legislative history indicates that carrier participation in the proceedings by which employees selected their representatives was one of the practices which the 1934 Amendments sought to preclude. Commissioner Eastman, the draftsman of the 1934 Act, testified that a fundamental principle of the Act was that carriers "shall in no way interfere" with their employees' choice of representatives, either directly "or indirectly" (Senate Hearings, *supra,* p. 12); that employees should be just as free from interference in selecting their representatives as carriers are in selecting theirs (*id.,* p. 148); that mere "advice" by the carrier might be "influence" (*id.,* p. 149); that the prohibition in Section 2, Third, against either party interfering with or influencing the designation of representatives by the other meant that the parties should be "wholly independent of each other" with respect to selecting collective bargaining representatives (House Hearings, Committee on Interstate and Foreign Commerce, *supra,* p. 22); and that the car-

[17] The other major objective was to create machinery for the resolution of so-called minor disputes or grievances.

rier "ought not to be the ones to decide what is for their [employees'] good" (*id.*, p. 24).

Mr. George M. Harrison, the President of the Brotherhood of Railway Clerks and the spokesman for the so-called 21 standard railway labor unions, testified before the Senate Committee that one change made by the bill was that (Senate Hearings, *supra*, p. 29):

> * * * it provides in connection with representatives that, should there be a controversy as to who should represent the men, the board of mediation shall handle the selection of representatives. *That is one reason, today, why men cannot get true representations, because the carrier participates in the conduct of the election* * * * [emphasis supplied].

In the House hearings, Mr. Harrison similarly pointed out that a problem under the earlier Act which the 1934 bill was intended to correct was the practice of employer participation in representation proceedings before the Board of Mediation (House Hearings, Committee on Interstate and Foreign Commerce, *supra*, pp. 78–79):

> So, this bill seeks to supply that deficiency in the Railway Labor Act in respect to that matter and I might best give the general experience, by citing a typical example of that situation today:
>
> The employees on a particular railroad will wish to affiliate with one of the standard railroad labor organizations. After they take membership and authorize the standard organization to represent them, then a formal re-

quest is filed with the railway management that the designated organization has been authorized by a majority of the employees involved to represent them in all matters affecting their wages and working conditions. The general reply from management is that, "We have an association on our property with which we have an agreement and we have no information that the employees have changed their minds about representation by that association".

And, therefore, they generally decline to meet the representatives of the organization which the employees have subsequently designated to speak for them.

The next move then is to take that controversy to the United States Board of Mediation and a mediator is generally assigned in an effort to persuade management to recognize the true representatives of the employees. *Generally in those proceedings a question comes up as to who shall vote in the election to determine the representatives and, most generally, that question is raised by the opposing association or representatives of management, for one, and only one purpose, of preventing a determination of that issue.*

* * * * *

So, this act is designed to take care of that situation by providing that, if any controversy arises among the employees as to who are their representatives and that controversy is carried to the Board of Mediation, the Board of Mediation shall investigate that dispute and certify to the parties who are the legally designated representatives * * * [emphasis added].

The fundamental purpose to allow employees to determine the forms of union organization, *i.e.* the collectivity for which union representatives might bargain, as well as the identity of the representatives, without any form of interference or influence on the part of carriers, was also brought out in the consideration of the proposed proviso to Section 1, Fifth, which provides that the ICC occupational classifications shall not limit the crafts according to which railway employees may be organized "by their voluntary action," and that nothing in the Act shall limit "the jurisdiction or powers of such employee organizations." Mr. Harrison pointed out that the proviso gave "organizations of employees * * * absolute freedom under this bill to determine and to define the crafts * * *." Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., p. 90.

Nowhere in the House or Senate Committee Hearings, in the House or Senate Committee Reports, or in the debates on the floor of Congress on the 1934 Amendments,[18] was it suggested or even intimated that carriers could still participate in a proceeding conducted pursuant to Section 2, Ninth.

C. THE ORIGINAL AND LONG-CONTINUED ADMINISTRATIVE INTERPRETATION SHOWS THAT A CARRIER HAS NO RIGHT TO PARTICIPATE IN A REPRESENTATION PROCEEDING

The National Mediation Board, which the 1934 Amendments established as the successor to the Board of Mediation that previously had administered the

[18] 78 Cong. Rec. 11710–11720, 12369–12376, 12388–12398, 12400–12402, 12549–12555.

Act, from the beginning interpreted the 1934 Amendments as changing the prior practice under which carriers had participated in representation proceedings. In its First Annual Report (1935) the NMB stated (p. 4):

> (a) *Representation disputes—Elections.*—In selecting representatives to deal with the management, disputes often arise among employees as to what organization they desire to represent them; and, *because employers have participated in such disputes favoring one organization or another,* bitter conflicts have often been precipitated. Section 2, ninth, of the amended Railway Labor Act provides an effective method of settling such disputes peacefully. If such a dispute arises among employees, it is the duty of the National Mediation Board, on request of either party, to investigate and to certify in writing to the parties and to the carrier the names of the individuals or organizations that have been designated and authorized to represent the employees. In such an investigation the Board may take a secret ballot, "or utilize any other appropriate method * * * as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." Thus *the management is eliminated, as a party, from any such controversy.* * * * [Emphasis added.]

Since that time the Board consistently has construed the 1934 Amendments as precluding carrier participation in representation proceedings under Section 2, Ninth. See, *e.g.,* 28th Ann. Rep., National

Mediation Board (1962) pp. 31–32; *Administration of the Railway Labor Act by the National Mediation Board 1934–1957*, p. 4; Twenty-ninth Annual Report of the National Mediation Board, p. 4; R. 38, 77–78, 86.

In the light of the statutory language and design and the legislative history of the Railway Labor Act, we submit that the Board's settled interpretation of the Act as precluding carrier participation in proceedings under Section 2, Ninth is a reasonable one and entitled to stand. The Board, which has conducted more than 3400 representaton elections since it was established in 1934 and has had the benefit of its predecessor's experience in administering the Act when carrier participation was allowed, is in the best position to evaluate the effect of such participation upon the free exercise by employees of their right to select their representatives.

III

A DISTRICT COURT MAY NOT ENJOIN THE NATIONAL MEDIATION BOARD FROM CONDUCTING AN ELECTION ON THE GROUND THAT THE BOARD SHOULD HAVE GRANTED THE REQUEST OF A GROUP OF EMPLOYEES OPPOSED TO ANY COLLECTIVE REPRESENTATION TO REDETERMINE, OR HOLD A HEARING ON, THE COMPOSITION OF THE ELECTORATE

It is not clear whether the order of the district court bars the Board from conducting an election without first holding a hearing on, or redetermining, the constituency in which the election would be conducted. The order provided (R. 171):

> * * * the plaintiff's request that the Board shall conduct a hearing relating to the ques-

> tion of the appropriateness of class or craft of employees among whom the election was to be held, at which hearing the plaintiff could be heard as a party in interest, shall be and the same is hereby remanded to the Board for further consideration in the light of the Court's conclusion that the Railway Labor Act * * * gives employees a right to have a ballot on which they may express a preference for no collective bargaining representation.

In terms, the order does not require the Board to hold a hearing. It merely directs NMB further to reconsider ABNE's request for one in the light of the court's holding that the ballot must give employees a space to vote for no representative. ABNE itself so interprets the order (Br. in Opp. 15), and that interpretation is consistent with the court's ruling that NMB craft or class determinations are unreviewable (R. 141, 155). If the order does not stay the election, the Board does not challenge it.

If, on the other hand, the order requires the Board to hold a hearing on, or to redetermine, the appropriate craft or class before conducting the election, it should be reversed.

The Board's refusal to hold a hearing on the constituency in which the election would be conducted did not constitute reviewable error. As this Court pointed out in *Switchmen's Union* v. *National Mediation Board, supra,* 320 U.S. at 304, the Board, unlike the Committees appointed by it, is not required to hold hearings in connection with Section 2, Ninth proceedings. Whether or not to hold a hearing is,

under the Act, a matter within the Board's discretion; and the Board's refusal to hold hearings in employee representation proceedings has been held unreviewable. *Cf. Air Line Stewards and Stewardesses Association* v. *National Mediation Board*, 294 F. 2d 910 (C.A. D.C.), certiorari denied, 369 U.S. 810; *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 255 (C.A. 2), certiorari denied, 376 U.S. 913.

Similarly, the Board's decision to adhere to the craft lines drawn in 1947 was not subject to judicial review. The specific Board rulings which the Court held non-reviewable in *Switchmen's Union* were craft determinations. The Act does not provide any specific guidelines for, or impose any specific prohibitions upon, the Board in defining the electorate; the matter has been left to the Board's discretion to decide on a case-to-case basis in the light of the general policies of the statute. Commissioner Eastman explained to the House Committee that in drafting the bill consideration had been given to defining crafts or classes, but that it had been decided to leave it to the Board to make those determinations in the performance of its functions under Section 2, Ninth. Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., p. 45; *id.*, pp. 40–41, 90, 131, 152.

Because of the absence of any specific statutory limitations upon the power of the NMB to define the electorate, the present cases are clearly distinguishable from *Leedom* v. *Kyne*, 358 U.S. 184, where a collective-bargaining-unit determination of the National

Labor Relations Board was held subject to direct judicial review. For the ground of that decision was that the Labor Board had acted "in excess of its delegated powers and contrary to a specific prohibition in the Act" (p. 188) that professional and nonprofessional employees should not be combined in a single unit without the approval of a majority of the professionals. The NMB's refusal to change its prior craft or class determinations, however, not only did not violate any specific provision of the Railway Labor Act, but was a ruling which the Act commits to the agency's discretion.

The fact that the Board's refusal to reopen the prior craft or class determination apparently rested on its view that ABNE, as a group opposed to any representation, lacked standing to challenge a unit determination that was supported by all the employees who wanted representation, does not justify a different conclusion. As we have shown (pp. 44–49, 56, *supra*), the Act permits the employees to decide upon what basis they want to be organized, and as long as all employees desiring representation agree to continue the unit previously selected, there is no occasion for the Board to reexamine the question. Since the only reason for making craft or class determinations is to determine who are the representatives chosen by a majority for the purposes of collective bargaining, an organization of employees opposed to any collective bargaining has no legally cognizable interest in the composition of the electorate.

757-778—64——5

CONCLUSION.

For the foregoing reasons, the judgment of the court of appeals should be reversed in Nos. 138 and 369, and affirmed in No. 139.

Respectfully submitted.

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DECEMBER 1964.

APPENDIX

NATIONAL MEDIATION BOARD,
Washington, November 6, 1964.

MEMORANDUM

To: All Carriers and Labor Organizations Concerned.

We are enclosing, for your information, a copy of recently issued instructions to our staff of Mediators relative to the National Mediation Board form of ballot to be used in future craft or class elections under the Railway Labor Act. Also enclosed is a sample copy of said amended form of ballot.

You will note that the referred to instructions will be applicable in all elections ordered by this Board after November 23, 1964.

THOMAS A. TRACY,
Executive Secretary.

Enclosure.

NATIONAL MEDIATION BOARD,

WASHINGTON

INSTRUCTIONS TO STAFF MEDIATORS RE FORM OF BALLOT

The Board, after consultation with the Solicitor General of the United States, directs that in all representation elections held under the Railway Labor Act after November 23, 1964, the following new language will be added to the ballot under the heading, "Instructions For Voting."

"No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

The foregoing language will appear on the face of each ballot, as indicated on the Sample Ballot attached. In order to assure uniformity, it is directed that all such ballots conform to the attached Sample Ballot.

Dated at Washington, D.C., November 6, 1964.

By order of the National Mediation Board.

THOMAS A. TRACY,
Executive Secretary.

OFFICIAL BALLOT OF NATIONAL MEDIATION BOARD

Involving (craft or class) employees of (name of carrier) (dates of election period)

(Case number)

A dispute exists among the above named craft or class of employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Railway Labor Act, and the National Mediation Board is taking a SECRET BALLOT in order to ascertain and to certify the name or names of organizations or individuals designated and authorized for purposes of the Act.

INSTRUCTIONS FOR VOTING

No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified.

If you desire to be represented by (name of contesting labor organization) mark an "X" in this square----------. ☐

If you desire to be represented by (name of contesting labor organization) mark an "X" in this square---------- ☐

If you desire to be represented by any other organization or individual write name of such organization or individual on the line below:
----------, and mark an "X" in this square---------- ☐

NOTICE

1. This is a Secret Ballot. Do Not Sign Your Name.

2. Marks in more than one square make ballot void.

3. Return this ballot in its entirety. Do not cut, mutilate or otherwise spoil it. If you do so, return ballot at once to Mediator and obtain a new one.

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United States

OCTOBER TERM, 1964

Nos. 369 and 138

NATIONAL MEDIATION BOARD, et al.,
Petitioners,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES,
Respondent.

No. 369

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Petitioners,

vs.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES,
Respondent.

No. 138

CONSOLIDATED BRIEF OF RESPONDENT, Association for the Benefit of Non-Contract Employees, in Reply to Brief Filed by the National Mediation Board and Its Members and Brief Filed by the Brotherhood of Railway Clerks in Cases No. 138 and No. 369.

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NATIONAL MEDIATION BOARD, et al., *Petitioners*, vs. ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent.*	No. 369
BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Petitioners*, vs. ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES, *Respondent.*	No. 138

CONSOLIDATED BRIEF OF RESPONDENT,

Association for the Benefit of Non-Contract Employees, in Reply to Brief Filed by the National Mediation Board and Its Members and Brief Filed by the Brotherhood of Railway Clerks in Cases No. 138 and No. 369.

QUESTIONS PRESENTED

1. Does the Railway Labor Act give employees the right to vote for or against collective bargaining representation?

2. Assuming such right is granted to the employees, does the ballot used by the National Mediation Board deprive employees of that right by its form?

3. Does the District Court have jurisdiction to stay an election in which a ballot form so deprives employees of the right?

4. Does a District Court having determined that a ballot to be used in a representation election should contain spaces wherein voters could indicate their preference for or against representation have jurisdiction to make an order affording the National Mediation Board an opportunity to reconsider granting a hearing on the constituency of the craft or class concerned in view of the Court's determination of the requirement of the Railway Labor Act as to the ballot.

STATUTES INVOLVED

In addition to the statutes referred to in the brief filed by the National Mediation Board, being the several provisions of the Railway Labor Act, 45 U.S.C. 151, et seq., the respondent designates the following:

1. The Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. The Administrative Procedure Act, 5 U.S.C.A. 1009.

Said provisions are set forth in Appendix A attached hereto.

STATEMENT

Respondent agrees generally with the statement set forth in the brief on file herein of the National Mediation Board.

Respondent, however, had no knowledge of the facts set forth under the heading "3. The Change in the Ballot" however, until the Board's decision was publicly announced. No conference or discussion took place between respondent and the National Mediation Board in the formulation of this additional language to be placed on ballots after November 23, 1964.

SUMMARY OF ARGUMENT

The Railway Labor Act affords employees the right to vote for or against collective bargaining representation.

This is admitted by the National Mediation Board.

The ballot form used by the National Mediation Board creates an election procedure in which the employees are faced with an ambiguous and confusing situation. The employees' right to vote for or against collective bargaining representation is effectively weakened, if not denied, by the National Mediation Board's election method.

This is also admitted by the National Mediation Board.

The additional language offered by the National Mediation Board as Instructions for Voting, while an admission of error by the Board, as to its former ballot, does little to clarify the confusion the ballot form provides. The simple, straight-forward solution to the problem is the addition of a box on the ballot which an employee can mark, indicating his desire for no representation. Any other device merely further complicates an already complicated and obscure procedure.

Actions by an administrative agency which are outside the statutory authority of the agency permit judicial intervention. This principle is based upon broad constitutional concepts and is specifically delineated in *Leedom v. Kyne*, 358 U.S. 184. Additionally, jurisdiction is vested in the Courts under the provisions of the Administrative Procedure Act.

In this case, the Courts below have determined that the National Mediation Board acted in excess of its delegated powers in denying to the employees under its jurisdiction a clear and unequivocal opportunity to exercise a right which the Board admitted was granted to them by the Railway Labor Act. That determination was correct and legally made.

ARGUMENT

THE NATIONAL MEDIATION BOARD ADMITS THAT THE NATIONAL RAILWAY LABOR ACT AFFORDS EMPLOYEES THE RIGHT TO VOTE FOR OR AGAINST COLLECTIVE BARGAINING REPRESENTATION.

In discussing the Act, the Board comments at length on the general scheme of the legislation and

points out that no specific wording is provided therein for a ballot form. To prove that the ballot form is not an "unreasonable construction" of a mandate from Congress to the Board (National Mediation Board Brief p. 40), the Solicitor General states that in his opinion the "old" ballot was unfair, but that the "new" ballot which is to include the additional wording shown in the National Mediation Board Brief is fair, in that it, "plainly advises each and every employee how to express a preference for no collective bargaining." The Board, on the Solicitor General's representation, changed the ballot. (National Mediation Board Brief, p. 30.) Continuing, the Board's brief states:

> "There is nothing in the present procedure that requires employees to designate a representative or hides the opportunity to reject all the contending unions."

These statements must be taken admit that which is patent in the Railway Labor Act, namely that employees have a right to reject representation if they so desire.

Quoting from the Act, as amended in 1934, 44 Stat. 577, 45 U.S.C. 152, in part:

> "Section Fourth: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

The Board rightly interprets this section and Section 2, Ninth of the Act to mean that if less than a majority of employees vote in an election for a representative, that employees in the craft or class have exercised their right to have no representation. This point is set forth in a footnote (National Mediation Board Brief p. 33, footnote) as follows:

> "In the district court government counsel stated (R. 144-145) that the Board 'has taken the position that the language of the statute requires a representative' and that employees 'just don't have a right to vote for no representation.' But the Board's consistent practice of refusing to certify a representative unless a majority of all the employees in the craft or class (as distinguished from a majority of those voting) vote for representation would seem to refute that statement. In any event, the Board presently does not hold the views that government counsel ascribed to it in the district court—as its recent action in changing the form of the ballot so clearly demonstrates (see supra, pp. 13-14, 23)."

These statements confirm the Board's admission that under the Railway Labor Act, the employees have a right to vote for no representation.

THE NATIONAL MEDIATION BOARD ADMITS THAT THE FORM OF THE BALLOT PROPOSED FOR USE IN THE UNITED ELECTION WAS UNFAIR.

The Board, acting on the representation of the Solicitor General, changed the ballot form. The ballot form which had been proposed to have been used was,

in the opinion of the Solicitor General, "unfair" (National Mediation Board Brief p. 30), admitting that:

> "it could be argued that this method (failure to cast a valid ballot) of opposing any representation was insufficiently publicized because the Board did not announce it on the ballot and employees were unlikely to read the lengthy rules for conducting elections in which it appeared."

and continuing on said page, states that the present ballot is fair. To effect this change, the Board has added this language.

> "Instructions for Voting
>
> No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified."

Throughout these proceedings, the Respondent has argued that the employees were entitled to a clear and unequivocal election procedure by which they would cast a vote for no representation. It was stated that no legend or direction existed on the ballot with respect to exactly what was to be done by the voter in order to cast a vote for no collective bargaining representative.

While the Board now, immediately before the filing of its Brief has added something, the question is, has the situation been clarified? The best answer is supplied the Board in its Brief (National Mediation Board Brief p. 31):

> "It is far from obvious that it is appreciably easier to mark the box designating one of the

unions than it is to cast a blank ballot, spoil the ballot, or cast no vote."

The National Mediation Board thus gives us at least three methods of proceeding. Which is correct? In considering the sample ballot provided in the appendix to the Board's Brief (National Mediation Board Brief p. 64), it does not appear that the added language has done anything more than compound the confusion.

The first idea suggested is, "cast a blank ballot." This is confusing in that the instructions at the bottom of the ballot say:

"2. Marks in more than one square make the ballot void."

Squares are provided for each union and a write-in. The specific instruction then is not to mark more than one square. No mention is made of marking no square. While counsel suggests the device, it is not authorized or referred to on the ballot.

The second idea is—"spoil the ballot." But observe the official command of the Board on the ballot!

"3. . . . Do not cut, mutilate or otherwise spoil it. If you do so, return ballot at once to mediator and obtain a new one."

The specific instruction is directly opposite to that suggested by the Brief. (National Mediation Board Brief p. 31.) The procedure suggested requires the voter to determine that the ballot instruction is incorrect and that he should ignore it. Not only is this con-

fusing, it seems hardly meet or appropriate that a citizen-employee should be required to puzzle out such a procedure. He should not be compelled to disregard an official governmental instruction on any ground, nor should he be placed in a position in which he is seemingly flouting the authority of the National Mediation Board in order to exercise his right under the Railway Labor Act.

The third suggestion is—"cast no vote." The ballot says however:

"3. Return this ballot in its entirety. . . ."

Again, as in the other instances, a conflict exists. Which instruction is the voter to follow? The National Mediation Board's suggestions as to procedures the voter should follow are contradictory to the wording of their ballot. The wording they have added does not resolve the problem nor does it authorize or instruct the employees clearly how to vote against representation.

The difficulty of applying the Board's suggestions in an election must be multiplied a hundred-fold when considering the problem as it will face an uninformed employee when he is confronted with this election procedure.

The ballot which was to have been used in the United election was unfair. It was so characterized by the Solicitor General. The National Mediation Board acting on that representation changed it. As per the foregoing argument the change has not effected the necessary purpose, to-wit: to clarify the

method in which the employee can exercise his right to vote for no representation.

Where the right has been thus obscured and confused, the employees have been effectively deprived of that right. It is this action by the National Mediation Board to which the respondent has addressed its action in the Courts below.

THE ACTION OF THE NATIONAL MEDIATION BOARD IN DEPRIVING THE EMPLOYEE OF HIS RIGHT TO VOTE AGAINST REPRESENTATION IS IN EXCESS OF ITS STATUTORY AUTHORITY AND SUBJECTS IT TO THE JURISDICTION OF THE FEDERAL JUDICIARY.

The National Mediation Board and the Brotherhood of Railway Clerks contend in this appeal that the District Court lacked jurisdiction to enjoin the Board from proceeding with an election for a representative for collective bargaining where the ballot failed to contain a space in which a preference could be indicated for no representation. This position rests primarily on the premise that the decisions of the Board are non-reviewable except in the limited situation where the Board exercises its authority in violation of the plainly expressed statutory duty. We feel that this premise is not sustained by the cases; the statute; the legislative history leading to the statutory enactment; or the appropriate provisions of the Administrative Procedure Act.

The Courts may entertain jurisdiction to review the acts of the National Mediation Board where the Board has infringed upon a right granted by Congress, or

where the act was in violation of a constitutional right of the employees.

In *Wes Chapter v. National Mediation Board*, 314 Fed. 2, 234 (1962), the Courts said:

> "Where Courts have taken jurisdiction of such representation disputes the context has strongly indicated either that the Board, by refusing to act has obliterated rights granted to employees by Congress (*Airline Dispatcher Association v. NMB*) or turning now to a situation arising under the National Labor Relations Act, the Board had acted in excess of its delegated powers contrary to a statutory provision which is 'clear and mandatory' *Leedom v. Kyne*, 358 U.S. 184 (1958). When this occurs, the courts 'cannot lightly infer that Congress does not intend judicial protection of the rights it confers against agency action taken in excess of delegated powers'."

The Railway Labor Act grants to employees the right to vote for or against representation by a collective bargaining representative. This right is illustrated in the following sections:

Railway Labor Act, as amended in 1934, 44 Stat. 577, 45 U.S.C. 152:

> "Section Fourth: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organiz-

ing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Agreement to join or not to join labor organizations forbidden

"Section Fifth. No carrier, its officers, or agents, shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

Disputes as to identity of representatives; designation by Mediation Board; secret elections

"Section Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and rec-

ords of the carriers to obtain and utilize such information as may be deeemed necessary by it to carry out the purposes and provisions of this paragraph."

Union security agreements; check-off

"Section Eleventh. Notwithstanding other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted——

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) To make agreements providing for the deduction by such carrier or carriers from the

wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of Section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said service; and no agreement made pursuant to sub-paragraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Pro-*

vided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent any employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238."

These sections indicate the number of instances in which the employees' rights are protected. First, the employees have under the Act, the right to organize and bargain collectively through representatives of their own choosing (Section Fourth). There is no requirement that they bargain collectively. The freedom to bargain collectively or not is reinforced by the provision that no carrier "shall require any person seeking employment to sign any contract or agree-

ment promising to join or not to join a labor organization." (Section Fifth). Only where a carrier and employees have mutually agreed upon a union shop, must an employee agree to join a labor organization (Section Eleventh).

Thus freedom of association or non-association is emphasized in the statutory language. The act grants "the right to determine who shall be the representative" of a craft or class to the "majority of any craft or class" (Section Fourth), thus indicating that in the event that the majority refuses to act or cast a vote for a representative that no representative shall be determined.

The question thus presented is whether or not the Board in providing the type of ballot used protects the rights of that "majority." The Board claims that it does because if a majority fails to return any ballot, then no representative is certified.

The language in Section Two, Fourth of the Act providing that the majority shall have the right to determine the representative inherently guarantees that the majority should have an effective method of indicating their preference. Any procedure which is calculated to deprive employees of an effective method is in derogation of the congressional grant. The Board concedes that the right exists, and in fact, devotes considerable time and effort in its brief to demonstrate that the balloting procedure employed by it, protects the right, and in fact, voluntarily and immediately before the submission of the National Mediation Board Brief in this Court, added language which it

maintained, clarified, the right of the employees and guaranteed them an effective method by which they could indicate their preference for no representation.

For the right to exist, employees must be given the opportunity to effectively exercise the right. It is our contention that the District Court was correct in determining that the procedure adopted by the Board denied to the employees an effective method of determining representation.

The ballot in the election procedure has been examined in foregoing sections of this brief. At the time the matter was argued in the District Court as is stated in the National Mediation Board Brief (National Mediation Board Brief p. 33), Counsel for the Board represented that the language of the statute required some representation and that the employees "just don't have the right to vote for no representation." That position has been changed by the Solicitor General. Before this Court, the statement is made:

> "But the Board's consistent practice of refusing to certify a representative unless a majority of all the employees in the craft or class (as distinguished from a majority of those voting), vote for representation would seem to refute that statement. In any event, the Board presently does not hold the views that government counsel ascribed to it in the District Court—as its recent action in changing the form of the ballot so clearly demonstrates." (National Mediation Board Brief, p. 33.)

The ballot now proposed is printed as an official government document and distributed under the offi-

cial title of the National Mediation Board, an agency of the United States Government. It will have on its face, a box for the Brotherhood of Railway Clerks, a box for the International Association of Machinists, and under it a box for a write-in organization or individual. No freedom of choice is afforded the electorate as no specific box or space is provided thereon for a vote for no representation.

In analyzing any ballot, it is obvious that position on the ballot is important. In the ballot originally provided for the election among United employees, the Board saw fit to place the boxes representing the contending unions opposite one another on the page so that no preference could be assumed. The importance of having no area upon the ballot or legend thereon which clearly refers to a vote for no representation cannot be underestimated.

The document is official. Mandatory instructions are set forth in strong terms and in many instances in bold type. The confusion and contradiction between the instructions proposed to be placed on the ballot were set forth in section two of this brief. The message on the official document is undoubtedly of great force and persuasion to the voters. As has been noted, the Board maintains that the employee can manifest his choice by refraining from voting, casting a blank ballot, or destroying the ballot. In view of the instructions analyzed above, the theory is impractical and discriminatory. An extreme doubt must be placed in the mind of the voter who wishes to indicate a preference for no representation in this election when

he is told that the method by which he must do so is by destroying or refusing to return the ballot, contrary to National Mediation Board instructions on that ballot. Certainly a law-abiding citizen must waver when he is confronted by those instructions and legends in bold type on the ballot. The Board cannot seriously maintain that this form affords a voter an effective right to cast a vote for no representation.

Under present Board policy, writing "no representation" in the space marked for a write-in candidate is a void ballot. (Allegheny Airlines, Inc., National Mediation Board Case No. R-3470 (1962).) The respondent's members must, under the present rules, refrain from voting and hope that in some manner, all of its members together with the other persons in the craft or class desiring to vote for no representation, will in some way understand that they must, in defiance of the instructions, destroy or refuse to return the ballot. These employees cannot be said to be "presumably assenting" to any union ultimately certified. The procedure for expressing this dissent remains complex, misleading, and tends to influence the employees by its form.

There is no legend or direction on the ballot which describes exactly what must be done by the voter in order to cast a vote for no bargaining representation. Observation of the words which the Board has consented to add to the ballot, demonstrates that no real attempt has been made even now, to inform the voter.

Should the voter mark the ballot "no representation" or "no union"? Should he return the mailing

envelope and the secret envelope marked A? Should he place his name and address on the outer envelope and include only the inner envelope and the ballot unmarked? The required procedure is highly ambiguous, and while originally indicating unqualifiedly that it would not correct the ambiguity, the Board has now proposed an additional instruction which compounds the confusion.

It is submitted that under these circumstances the National Mediation Board can be said to be "obliterating rights granted to employees by Congress" and has acted "in excess of its delegated powers" contrary to a statutory mandate which is "clear and mandatory" as referred to in *Wes Chapter v. NMB,* 314 Fed. 2d 234.

(A) The Board's Interpretation of Its Statutory Duties Under the Act Is Contradictory.

The real question posed by this case is brought about by the contradictory positions of the Board. On the one hand, it maintains that the election is designed to permit free choice of a representative. On the other, it admits that the ballot is slanted, designed and calculated to cause the employees to vote for the representative or representatives whose names appear on the ballot. This is due to the Board's stated position that its duty is to insure *some* type of representation. This position is fraught with difficulty.

The Board's position was originally stated in a colloquy between Judge Luther Youndahl and Counsel Harland Leathers at the hearing in the District Court where the following exchange took place:

"The Court: They claim they have no right to vote at all.

Mr. Leathers: No, they have a right to vote. They just don't have a right to vote for no representation.

The Court: Isn't that in effect giving them no right to vote?

Mr. Leathers: No, because they can vote for one of the representatives if they wish to.

The Court: Suppose they don't want to vote for either? They are denied to vote on that issue?

Mr. Leathers: Yes, that's right. Understand, they are not denied the right to express their views by refraining from voting." (R. 145.).

While the Solicitor General has disavowed this position, the policy is unreservedly stated in an excerpt from an official Board publication (Administration of the Railway Labor Act, 1934, 1957):

"'The above quoted excerpts from the Act clearly show that it was the intent of Congress in planning the 1934 Amendment . . . that both the carriers and the employees separately designate representatives for the purpose of collective bargaining. To effectuate this mandate of Congress the National Mediation Board, in 1934, designed a form of ballot which has been used without material change to the present time. This ballot was drafted to permit the employees to secure some form of representation as contemplated in the sections of law quoted above. It leaves to the majority of the employees, of any craft or class, full freedom to determine who should be their representative for the purposes of the Act."

Having thus committed itself to a policy of slanting or weighting its election so that some organization or individual will be elected, the Board statement, that it is protecting the right to a vote against representation, cannot be accepted. The Board cannot demonstrate even limited protection by allusions to the employees' right to refrain from casting a ballot, where the employee has been confused and misdirected by contrary instructions of the ballot itself, and has been denied a clear and definite procedure for registering a vote against collective bargaining representation. The proposed addition to the ballot does nothing toward meeting the problem. In spite of the Board's action immediately prior to filing its brief, its fundamental position remains that it has the authority to weaken or obscure one choice in an election, and proposes to continue to do so in the ballot now presented.

(B) The Procedures of the National Labor Relations Board in Regard to Elections.

As has been noted in the National Mediation Board Brief, the National Labor Relations Board and the Courts in the interpretations of procedures under the National Labor Relations Act have decided that a ballot without a box or space for a no representation vote deprives the employee of an effective voting method.

The problem with respect to a ballot in a representation election is certainly not unique to the National Mediation Board having been dealt with for

many years by the National Labor Relations Board. That Board, in handling many hundreds of industries, in some instances, of equal sensitivity and importance to those companies and industries with which the National Mediation Board is concerned, has traditionally provided a space within which voters can indicate their preference to vote against bargaining representation.

If only one union is involved, the ballot will contain a yes and no box. *Solomon Manufacturing Company,* 3 NLRB 926, amended 4 NLRB 36 (1937); *Walker Vehicle Company,* 4 NLRB 242 (1937) and *Interlake Corporation,* 4 NLRB 55 (1937).

The position of the National Labor Relations Board was expressed in the *Interlake* case *supra,* wherein the National Labor Relations Board denied the motion of two contending labor unions to have the words "or by neither" struck from the ballot saying:

> "The Act, however, does not require an unwilling number of employees to bargain through representatives. It merely guarantees and protects that right of a majority if it chooses to exercise it. Yet, if the opportunity of voting against the organizations named on the ballot were denied, a majority might be forced against its will to accept representation by one of the other of the nominees. The policy adopted by the Board is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives. . . .

It was contended by counsel for Steel Workers Organizing Committee, that the privilege of an employee to indicate that he does not desire either of the named unions to represent him, if it must be preserved, could also be expressed by refraining from voting or by casting a blank ballot. In line with other authorities, both before and after our decision, however, we indicated in matter of R.C.A. Manufacturing Company, Inc. *supra* that those not voting would be presumed to acquiesce in the choice of the majority who do vote and thus the employee who does not desire to be represented by either designated union would not express this preference by refraining from voting. As to the solution of casting a blank ballot, the practice of the Board, again in line with other authorities, has been to hold that a blank ballot must be regarded as a failure to vote by one qualified to do so. We see no advantage in forcing employees who disapprove of the nominees to adopt the rather ambiguous method of expression involved in casting a blank ballot when their choice can be clearly indicated by providing a space therefor.

For the reasons which we have outlined, it is the conclusion of the Board that a free expression of desires of the majority of the employees in the unit found appropriate in the present case demands that the ballot provide for a space in which employees may indicate that they do not desire to be represented by either of the named organizations. The motion to amend the directions of election by striking therefrom the words 'or by neither' is hereby denied."

It should be noted that this case was decided prior to 1947 when express language giving employees the right "to refrain from" organizing was added to the National Labor Relations Act. The National Labor Relations Board stated the only fair conclusion arising from the operation of the election procedures as they then existed in a statute which provided no specific ballot form. The identical situation is now being administered by the National Mediation Board. The attitude and conduct of the Board with respect to the situation is unjustifiable under its statutory authority or as will be shown under constitutional guarantees which extend to employees under its jurisdiction.

In the one case in which the Courts have commented on the form of the ballot used by the National Mediation Board, *McNulty v. NMB*, 18 F. Supp. 494 (N.D.N.Y. 1936), although by way of dicta, the Court had this to say:

> "It is manifest that this ballot did not present the issue to the eligible voters.
>
> "The issue, of course, as the mediator admittedly found, was whether the men desired to continue under the individual contract method or the National Union representation.
>
> "Concerning these two methods, the O.R.T. Brief says: 'These two methods of employer-employee relationships are diametrically opposite, both in theory and practice. They have nothing in common. There can be no representation under the first method and representation is essential under the other.'

"But the employees had no opportunity to express a choice between these methods. They were in effect told that they must have representation for collective bargaining and were asked to elect between the National Union (O.R.T.) and an unknown.

"Unless the statute in question is meant to compel a majority of the employees (not an individual employee) to surrender their constitutional right to contract for their own services, and the defendant O.R.T. does not so contend, then the ballot in question in no real sense determines whether the employees wish to retain the old method of individual bargaining, or prefer to change over to collective bargaining.

"In short, the ballot is an artificial thing in no wise disclosing which method of contracting the majority wish, but merely shows that, if they must have collective bargaining, they preferred the O.R.T. to some unknown person or organization.

"It is idle to say that 'it was not necessary for the contract men to affirmatively vote their desire in order to win but merely necessary, that their vote be against representation by the O.R.T.'

"Fifty employees tried to do just that by putting an X mark in the square opposite the words 'if you desire representation by any other organization or individual, mark an X in the square,' but because they did not write in the name of some organization or individual as representative in collective bargaining, the votes were declared void and not counted.

"The ballot gave them no opportunity to vote against representation by the O.R.T., for their

choice was limited to representation by O.R.T. or by some unknown representative.

"Confronted with such a ballot which may have feared that some militant group might want to write in the name of the President of the railroad or some obnoxious foreman, and believing that they had to select someone to represent them in collective bargaining, rather than take such chances on an unknown representative, they voted for the known O.R.T.

"How they would have voted had the real issue before them been presented by the ballot, no one knows or can know until another ballot presenting that issue is taken."

While it is admitted that the statutory authority of the National Labor Relations Board is different than that under which the National Mediation Board functions, it is nevertheless difficult to understand how or why it may be stated that the employees in one industry should be given an unequivocal right to vote and the employees in the other should be caused to suffer a confusion and dilution of their right to vote by the agency under whose jurisdiction they happen to fall.

(C) To Claim That the Scheme of the Railway Labor Act Affords Freedom of Choice on the One Hand and Authorizes a Procedure by the Board Calculated to Determine the Choice on the Other, Is Contradictory to the Legislative History of the Act.

The Board seeks to escape this dilemma by interpreting the Act as imposing upon it the mandate to enforce collective bargaining. We submit that it does

not. No express direction is contained in the Act and any implied mandate must twist or distort that wording. Any ambiguity, if one can be said to exist is clarified by an observation of the statements made at the time of the enactment of the Act by the legislature and its draftsmen.

The House report of HR 9861 which accompanied the 1934 Amendment to the Act, read:

> "... it (HR 9861) provides that employees shall be free to join any labor union of their choice and likewise be free to refrain from joining any union if that be their desire, and forbids interference by the carrier's officers with exercise of said rights (House Report 1944 to accompany HR 9861, U.S. House of Representatives, Committee on Interstate and Foreign Commerce, 73rd Congress, 2nd Session, 1934, at page 2.)"

Commissioner Joseph P. Eastman, Federal Coordinator of Transportation, referred by the Supreme Court in the *Switchman's* case as the draftsman of the 1934 amendment testified in the House on HR 7650. Mr. Eastman's views were accepted in the *Switchman's* case at 320 U.S. 297, 302-3. In the House, he said:

> "Mr. Huddleson: Well, as I get your idea, it is the purpose of this bill not to coerce organization and not necessarily to imply organization.
>
> Commissioner Eastman: No. It does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why that of course is left open to them, or it should be. (Hearings

HR 7650, U.S. House of Representatives, Committee on Interstate and Foreign Commerce, 73rd Congress, 2nd Session, 1934, at page 57)."

In the Senate, on Senate Bill 3266, Senator Wagner, the outstanding figure in labor legislation at the time, made the following statement:

"Senator Wagner: I am very glad you (Commissioner Eastman) are bringing out these points so very clearly. . . . I think that it is the purpose of the Act—I think it is so expressed in language, to give the worker a free choice to join any union he wants, company union or no union, and yet they (i.e., the opponents of the Bill) have insisted (that) by giving him free choice that it creates a large national union. I do not know how that conclusion is reached, but it has been broadcast, so I am very glad you are clearing that point. (Hearings on S-3266 U.S. Senate, Committee on Interstate Commerce, 73rd Congress, 2nd Session, 1934, at page 12.)

"Senator Wagner: I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the man had absolute liberty to join or not join any union or to remain unorganized. (id. p. 76)."

The legislative history of the Act is diametrically opposed to the Board's contention of a "mandate", but rather gives strong support to the position that under the statute employees were given a right to vote for or against collective bargaining representation. Without some demonstrated language, implication, or legislative history, save and except the

Board's own pronouncements, actions which take away Congress-given rights of the employees are unjustifiable and in excess of powers delegated to the National Mediation Board. If the meaning of the Act, as intended by Congress, was that employees must bargain collectively, the Act may have read:

> "Employees shall elect representatives from individuals or unions who shall then be their representatives for the purpose of the Act."

No such language appears and the legislative history referred to hereinabove indicates that this was not the intention of the Congress.

THE ACTION OF THE NATIONAL MEDIATION BOARD IN DEPRIVING THE EMPLOYEES OF THEIR RIGHT TO VOTE AGAINST COLLECTIVE BARGAINING REPRESENTATION WAS AN ABRIDGMENT OF THE CONSTITUTIONAL RIGHTS OF THE EMPLOYEES WHICH PERMITS JUDICIAL REVIEW.

Thus far, arguments have been directed to infringement by the National Mediation Board of rights granted to the employees by Congress by the Railway Labor Act. In addition to limitation on infringement of Congress-given rights, the Board is bound by the limitations of the United States Constitution, and the Federal Judiciary had a right to review the actions of the Board in that light. In *Switchman's Union of North America v. NMB,* 320 U.S. 292, which is heavily relied upon by the Board and the Brotherhood of Railway Clerks, the Supreme Court barred judicial review of craft or class determinations by the Board. At no time, however, did the Court sanction Board

decisions made in excess of the constitutional guarantees of the employees and specifically left that question open, avoiding the constitutional question in these words:

> "Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is up to the Congress to determine how the rights which it creates shall be enforced. Tutun v. U.S., 270 U.S. 568, 576, 577, 46 S.Ct. 425, 70 L.Ed 738. In such a case the specification of one remedy normally excludes the other." (Citing cases.)

Depriving employee voters of their clear and unequivocal right to cast a vote is to deprive them of their rights under the Fifth Amendment of the Constitution of the United States. Valuable property rights, to wit: their individual bargaining agreements, with their employer, will be taken from them without due process of law.

In large majority, the group sought to be organized by the unions in the case at bar has traditionally had no representation. As to the members of the group in the public contact division of United Air Lines, for example, long term individual agreements reached through training, educational requirements and seniority have been established. In the instance of electronic computer personnel, development and qualification studies stemming from the most modern scientific methods have been factors in establishing individual bargaining agreements. These valuable

property rights cannot lightly be taken from the employees concerned. To permit the Board to carry out its plan in this instance would not only deprive these employees of their rights, but would deprive them of effectively expressing their opinion of the taking. It is submitted that the Board has no authority or justification in the statute which would vest it with this power. Under the general provisions of the United States Constitution it is specifically prohibited from doing so. Fundamental concepts of Constitutional fair play necessarily condemn the Board's proposed seizure of these rights without authority or compensation to the individuals concerned.

THE ACTION OF THE NATIONAL MEDIATION BOARD IN DEPRIVING THE EMPLOYEES OF THEIR RIGHT TO VOTE AGAINST COLLECTIVE BARGAINING REPRESENTATION IS SUBJECT TO FEDERAL REVIEW UNDER THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT.

Apart from the right of the District Court to entertain jurisdiction in cases where the Board has deprived employees of rights given by Congress, or protected by Constitutional guarantees, the Court has jurisdiction under the Administrative Procedure Act. It is interesting to note that though the application of the Administrative Procedure Act was argued in the Court of Appeals, no reference is made with respect to it in the briefs on file herein of the National Mediation Board or the Brotherhood of Railway Clerks.

The Board's position that its actions are not subject to judicial review based upon the *Switchman's*

case, must be inspected in the light of *Airline Dispatchers Association v. NMB*, 89 U.S. App. D.C. 24, 189 Fed. 2d 685 (1951), cert. denied, 342 U.S. 841 (1951). This case discussed the sweeping language of the *Switchman's* case and concluded that a fundamental change had been brought about by the enactment of the Administrative Procedure Act, 5 U.S.C.A. 1001-11. (See Appendix.) It was noted that Section 1009 of that Act provided in part as follows:

> "Except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion—(a) Right of Review—any person suffering legal wrong because of agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." (5 U.S.C.A. Section 1009.)

The Court continued by saying that although the Administrative Procedure Act was not intended to change existing case law as to particular issues which had been previously held not within judicial cognizance, such broad statements as that in the *Switchman's* case to the effect that in view of the history of the Railway Labor Act, a purpose to afford judicial remedy must plainly appear, "should now be read in the light of the purpose of the Administrative Procedure Act subsequently enacted." 89 U.S. at 28. The Court went on to quote from a document indicating that purpose:

> "Legislative intent to forbid judicial review must be if not specific in terms, at least clear, convincing and unmistakable under this Bill. The mere

fact that Congress has expressly not provided for judicial review would be completely immaterial. (Ibid.)"

The Court concluded that if the "nature of the question" was such as to suggest judicial review, then the Administrative Procedure Act would authorize such review. In the District Court, the determination was made that the "nature of the question", in this case, was one urgently requiring judicial review, stating that the question involves a "serious issue of statutory construction, possibly rising to constitutional dimensions." (R. 143.) In the light of this finding, the Administrative Procedure Act authorizes judicial review.

In the *Airline Dispatchers Association v. NMB*, 89 U.S. App. D.C. 24, 189 Fed. 2d 685 (1951), cert. denied, 342 U.S. 841 (1951), the Court further stated that the *Switchman's* decision did not preclude review by the Courts of Board action in determining a disputed question of representation under Section 2, 9th of the Railway Labor Act in these words:

> "Generalizations as to when judicial review of administrative action may or may not be obtained, are, of course, hazardous. Where Congress has not expressly authorized judicial review 'the type of problem involved as well as "history of the statute involved" become highly relevant.'
>
> "The type of question now presented was, as we have said, in the area of those reserved under the Railway Labor Act. This being so, and because of the nature of the question, we are of the opinion that the Administrative Procedure Act

indicates a congressional purpose to authorize review of it by the Courts. Since it is not a question of the type previously held unreviewable, and since there is no explicitness in the Railway Labor Act, or indication in its history of a Congressional intention to leave it exclusively to the Board determination, the provisions of Section 10 of the Administrative Procedure Act for Court review take hold of it.

"Court review not being precluded, jurisdiction of the District Court is found in 28 U.S.C. Section 1337, formerly U.S.C. Section 41 (8), which reads, 'The District Court shall have original jurisdiction of any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.' See Switchman's Union v. NMB, 320 U.S. at page 300, 64 S.Ct. at page 96, 88 L.Ed. 61."

The Court specifically referred to and rejected the principles set forth in the *General Committee v. Missouri KTR Company,* 320 U.S. 323, and *Order of Railway Conductors v. Pennsylvania Railroad Company,* 323 U.S. 166 as changed under its interpretation of the Administrative Procedure Act.

The respondent contends then, and the District Court and the Court of Appeals has agreed, that the Federal Court has jurisdiction of the cause. First, rising from the statute by virtue of an infringement by the National Mediation Board of a right given to employees under the Railway Labor Act. Second, by virtue of the fact that the action of the National Mediation Board is in excess of its statutory powers.

Third, as violative of the rights of the plaintiff's members and fundamental concepts of fair play under the Fifth Amendment to the Constitution of the United States, and Fourth by virtue of jurisdiction granted to the Court under the provisions of the Administrative Procedure Act.

These contentions are borne out by the cases in which courts have regularly taken jurisdiction to review the actions of the National Mediation Board in instances where serious issues of Constitutionality or statutory construction were presented.

Thus, in *Virginian Railway Company v. System Federation,* 300 U.S. 515 (1937), the Court took jurisdiction to decide whether or not the Railway Labor Act was within the power of Congress to enact, and whether such act required an employer to negotiate with a collective bargaining representative once such representative had been certified by the Board. In *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944), the Supreme Court held that there was jurisdiction to decide whether the Act required a union bargaining representative to represent all employees within the craft or class regardless of race, thereby reversing lower Federal Courts which held that there was no such jurisdiction.

Specifically distinguishing the *Switchman's Union* case, 323 U.S. at 213, in *Wes Chapter v. NMB,* 314 Federal 2d at 237, the Court of Appeals discussed the Board's procedures before reaching a conclusion that the "investigation" required by the statute, 45 U.S.C.

152, 9th, had been held, and that no constitutional question of due process was presented. The Court of Appeals also specifically took jurisdiction to determine the correctness of a construction of the statute by the Board which limited the statute's geographical scope. *Airline Dispatchers Association v. NMB,* 89 U.S. App. D.C. 24, 189 Federal 2d 685 (1951), cert. denied 342 U.S. 849 (1951).

On the foregoing arguments the respondent contends that the Federal Judiciary has jurisdiction to review the action of the National Mediation Board in providing for employees a ballot which was unfair in form so as to derogate and materially affect the right of employees to vote against collective bargaining representation.

ARGUMENTS OF THE NATIONAL MEDIATION BOARD.

In its brief, the National Mediation Board relies primarily on two points. First, that the case of *Leedom v. Kyne,* 358 U.S. 184, requires that judicial review is only possible where the Board's act was made in excess of its delegated powers and contrary to a specific prohibition in the Act, and secondly, that the Board under the Act, is subject to no limitation with respect to the manner in which an election is to be conducted and may, in fact, determine representation without an election at all.

With reference to the *Leedom v. Kyne* case, 358 U.S. 184, the National Mediation Board, in its briefs,

has consistently maintained that the employee has a right to vote against collective bargaining representation. If this is true, then how can the Board abridge and deny employee voters free exercise of that right? If the right is admitted to exist and to flow from the statute, how then can such abridgement or denial be interpreted to be other than an act contrary to a specific prohibition in the Act?

Once again, the argument points up the Board's dilemma. They have admitted that the employees possess the right to vote against representation. In spite of this view of the congressional expression, the Board somehow reaches the conclusion that it is entitled to take action which will influence or weight that expression. This position is untenable and places the Board's actions squarely within the purview of the *Leedom v. Kyne* case as in excess of its delegated powers and contrary to an admitted prohibition of the Act.

The second argument which contends that the Board is the sole arbiter of the manner in which a determination of representatives should be made cannot be true. There are many situations in which the Board would be clearly acting outside its delegated authority in an election wherein no question could be raised with respect to the right of the Federal Court to review it; for example, what of the instance wherein the Board would propose a ballot wherein the name of but one contending union would be placed on the ballot and the name of a second contending union omitted therefrom?

Although the statute provides that a determination of representation can be made without an election, this provision offers little help to the Board in this case wherein the Board has made its own decision that an election is to be conducted. Having made that decision, the Board is clearly bound to conduct the election in a manner which is fair and non-discriminatory as far as the methods of determining the intentions of the employee members are concerned.

The Board contends that this broad and general power granted to the Board is necessary to effectuate the purposes of the Railway Labor Act and is in some manner related to a special "expertise" which Board members, by virtue of long experience would possess. There are unquestionably some areas in the conduct of business before the National Mediation Board, wherein such prior knowledge and expertise are valuable and productive. It is, however, subject to serious question whether such relation can be made to a ballot form. It would seem that the creation and use of a fair and non-discriminatory ballot is the business of all of the citizens of the United States and is perhaps the very cornerstone of our democracy itself. No government board or agency possesses such knowledge or expertise which qualifies it to utilize a ballot which, in its discretion, could influence or slant its elections. Especially is this true when the action must be considered to be covert, as being done without the full knowledge or consent of the citizen employees with which the National Mediation Board is concerned.

This is not the type of question which an expert administrative body is needed to decide. Experience with the Railway Labor Act and administration of the Act adds little, if a ballot form created and used is not completely fair to all employee voters.

The Board has defended its actions at each hearing of this case on the argument that this ballot by the Board has been used since 1934 in some 3400 elections. It is difficult to see how this will assist the Board if in fact the rights of employee voters were being abridged. In its own publication, the Board notes objections to the ballot in past as follows:

> "Although occasionally it is suggested that the ballot used by the National Mediation Board does not permit a clear expression by a majority of eligible voters of their representation preference (Administration of the Railway Labor Act by the National Mediation Board 1934-1957 pp. 18-19), the Board's experience has been to the contrary."

Thus, while arguing the point, the Board admits that objections have been made and that they have been aware of the fact that employee voters have felt that this voting procedure was discriminatory and prevented a "clear expression by the majority of eligible voters of their representation preference."

The Board argues that there is no obvious great psychological advantage to the unions having boxes on the ballots whereas employees who oppose collective bargaining must express their will by following the instruction plain on the face of the ballot instead

of marking a box. But even this argument is qualified by the National Mediation Board in these words:

> "We may assume, however, that there is some advantage, indeterminate in degree because the form of the ballot seems to carry some slight assumption that the employees will want to designate one of the unions. That advantage, we submit, is no more than the statute itself contemplates." (National Mediation Board Brief pp. 31, 32.)

Even with the qualification, the argument is faulty, in that it is well-known that ballot composition and position is of extreme importance in any election proceeding. Instructions on the face of the ballot as shown in the first sections of this brief are not clear but in contrast thereto, are confusing and misleading. But the qualifying statement again emphasizes the position the Board is taking upon itself, namely, the obligation to create in favor of some representation, an advantage, although characterized as "indeterminate in degree." The Board has failed to demonstrate authority, in the Act, or the legislative history of the Act, justifying its seizure of this power.

The right of the employees either exists or it does not. The Board consistently maintains in its arguments and demonstrates that in its procedures, that the right in the employees to cast a vote or to indicate their preference for no representation exists. This being the fact, the Board has no right to in any way, confine or restrict the employees in their exercise of that right. The two positions of the Board simply cannot be reconciled.

In its argument, the National Mediation Board relies on *Rose v. BRC*, 181 F. 2d 944 (1950) and *Droggos v. NMB*, 227 Fed. Supp. 61 (N.D. Ohio), wherein the Courts considered the question raised as to the ballot form where a group of employees challenged a union already certified by the National Mediation Board because the ballot provided did not afford the employees an opportunity to vote against collective bargaining. In the *Droggos* case, the Court refused to enjoin the holding of an election among employees because of asserted invalidity of the ballot disagreed with the case at bar and relied on the *Rose* decision. It is our contention that the *Rose* case is not sufficient to support the *Droggos* decision. That case involved a motion by certain employees to intervene in a case filed by the Brotherhood of Railway Clerks against a railroad. The Brotherhood of Railway Clerks had been certified by the Board as a bargaining representative. The National Mediation Board was not a party to the case. The Court spoke of the exclusive jurisdiction of the National Mediation Board in the matter of certifying bargaining representatives. Specifically, the Court stated that the Board had exclusive jurisdiction over the determination of groupings of employees into bargaining units. The validity of the certification however, and therefore the form of the ballot question presented therein, was not reached by the Court, inasmuch as the Board was not a party to the action and was not present to defend itself. Here, a specific act of the Board is directly attacked. The general jurisdiction of the Board as it affected a collateral action in the *Rose* case, does not provide a defense in the case at bar.

THE DISTRICT COURT'S AFFORDING AN OPPORTUNITY TO THE NATIONAL MEDIATION BOARD TO RECONSIDER THE REQUEST OF THE RESPONDENT TO CONDUCT A HEARING ON THE COMPOSITION OF THE CRAFT OR CLASS, DID NOT ENJOIN THE NATIONAL MEDIATION BOARD FROM CONDUCTING AN ELECTION BEFORE SUCH A HEARING.

The District Court afforded the National Mediation Board an opportunity to reconsider its position with respect to the craft or class grouping in view of its holding with respect to the requirements of a ballot form in the following wording, quoting from the judgment (R. 156):

> "Because the Board's position on the other issues raised by the plaintiff—requesting a 'hearing' on the appropriateness of class or craft designated at which the plaintiff would have status as a party in interest—depends partly upon the Board's interpretation of the statute as not permitting a vote against representation, the Court will decline to express any opinion on those issues and will instead remand the matter to the Board for further consideration in light of the fact that the Board's interpretation of the statute has been found erroneous. . . ."

In the light of this statement in the judgment, it is felt that the Court is merely affording to the National Mediation Board an additional opportunity to consider its decision with respect to the hearing after being apprised of the fact that its view with regard to the ballot is incorrect. That this procedure is advisable is illustrated by the fact that the result of the election to be conducted, not only determines the representative of the craft or class concerned, but also, affords employee voters the right to register their

feeling with respect to the grouping of the craft or class. A negative result, that is, one in which the employee voters refuse to indicate a preference for a collective bargaining representative, can be considered not only to be a vote in opposition to the candidate unions in contention, but also, may be a vote against the manner in which the National Mediation Board has grouped employees. In view of the determination made by the Courts below, with respect to the form of the ballot, the National Mediation Board might well wish to reconsider the grouping and redraft the constituency so as to create a situation in which a more closely allied group of employees might be more likely to designate a representative. The National Mediation Board, with this knowledge, may desire to make a new decision with respect to a public hearing on the issue, and when that decision is made, an entirely new set of circumstances may well prevail.

The Board's objection to this opportunity for reconsideration is premature, in that it has not been compelled to make a finding in any specific manner with regard to whether or not it should grant a hearing on the question presented. In other words, the Board is not being instructed or directed by the Court with respect to what its findings should be, but is merely being afforded an additional opportunity to make the decision in view of the Court's determination of the law governing the Board's action as it concerns ballot form. The Board's objection is not substantial and indicates no injection by the Court of a power to determine Board action.

It is admitted by the National Mediation Board that the Board's refusal to reopen the prior craft or class determination rested on its view that the respondent as a group opposed to any representation lacked standing to challenge a unit determination (National Mediation Board Brief p. 61), while it is now admitted that the respondent as an organization consisting of employees opposing representation are a proper group and do have standing to complain that the National Mediation Board's procedures do not properly allow employees opposed to representation to express their desires. (National Mediation Board Brief p. 20, footnote.) In view of the Board's admission that respondent does have standing to complain of National Mediation Board procedures, it seems proper that the Court's opportunity to the Board to reconsider the matter should be permitted to stand. For it would appear that even in the absence of the ballot form question, the Board has now changed its position with respect to the basic question of respondent's standing before it.

Arguments which tend to support the position that respondent employee voters have standing to complain of a National Mediation Board procedure as it affected balloting but do not have standing to complain of National Mediation Board procedure as it affected a grouping in a class or craft is without support or authority in the act or cases interpreting the Railway Labor Act. Stating that the only reason for making craft or class determinations, is to determine who are representatives chosen by a

majority, is too narrow an interpretation. The employee voters in exercising their voting rights are voting for contending unions or individuals and at the same time are indicating their assent or objection to the grouping itself. This, in fact, is the only way in which concerned employees can express their consent or objection to the manner in which they have been grouped by the National Mediation Board. To declare that they have no legal cognizable interest in the electorate is once again an attempt to limit or restrict the rights of the employees concerned without statutory or other authorization.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in cases numbered 138 and 369 should be affirmed.

Dated, San Francisco, California,
December 23, 1964.

Respectfully submitted,
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(Appendix "A" Follows)

Appendix "A"

AMENDMENTS TO THE UNITED STATES CONSTITUTION

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[Section 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

5 *U.S.C.A.* § 1009

JUDICIAL REVIEW OF AGENCY ACTION

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of Review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and Venue of Proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts Reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief Pending Review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this

title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 139

UNITED AIR LINES, INC.,

Petitioner,

vs.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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IN THE

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OCTOBER TERM, 1964.

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UNITED AIR LINES, INC.,

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NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR PETITIONER UNITED AIR LINES, INC.

This case was consolidated for argument and decision in the Court of Appeals with Nos. 138 and 369. The three cases were also consolidated in this Court in the orders granting the petitions for writs of certiorari. The National Mediation Board and its members are respondents in this case and petitioners in No. 369. The Board has filed a consolidated brief in the three cases, and this brief will stand as the opening and reply brief for petitioner United Air Lines.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 146-154)[1] is reported at 330 F. 2d 853. The order of the District Court (R. 144) is not reported. There was no opinion by the District Court.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered on March 12, 1964 (R. 156). Petition for rehearing was denied on April 14, 1964 (R. 157). The petition for a writ of certiorari was filed on June 1, 1964, and was granted on October 12, 1964 (R. 158). Jurisdiction is conferred on this Court by 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. The National Mediation Board refused to hold a hearing at the request of United on the question of the appropriate craft or class of United's employees among whom an election was to be held to determine a representative for bargaining under the Railway Labor Act. The stated reasons for the refusal were that the Board did not consider United to be a party in interest on the question and that the labor organizations involved had agreed on the unit. The Board took no evidence on the craft or class question, and accepted the agreement of the labor organizations without independent inquiry. The questions presented are:

   a. Does a carrier have a constitutional right of due process to be heard by the Mediation Board on the craft or class issue?

   b. May the Board, in the exercise of its duty under the Railway Labor Act, make a craft or class deter-

1. References are to the record in No. 139. Any reference to the separate consolidated record in Nos. 138 and 369 will be specifically noted.

mination arbitrarily by accepting the division of employees agreed upon by interested labor organizations without consideration of any other criteria?

c. Does a carrier have judicial standing to raise the foregoing questions?

2. The form of ballot used in a representation election by the Mediation Board does not permit an eligible employee to cast a valid ballot for no representation. Does this form of ballot violate the mandate of the Railway Labor Act that the majority of employees in the craft or class have the right to select the representative for the craft or class?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Involved are the Fifth Amendment to the United States Constitution and Sections 2 Fourth and Ninth of the Railway Labor Act, 48 Stat. 1187-88, 45 U. S. C. § 152. These provisions are printed as an Appendix to this brief.

STATEMENT.

United is a certificated air carrier subject to regulation under the Federal Aviation Act of 1958 (72 Stat. 737, 49 U. S. C. § 1301), and the Railway Labor Act (48 Stat. 1185, 45 U. S. C. § 151). It employs approximately 32,000 persons. Of these, approximately 4,500 are office and clerical employees such as typists, stenographers, file clerks, electronic computer and office machine operators, receptionists and telephone operators; approximately 5,100 are public contact employees, such as reservation and ticket sales agents, vacation booking agents, passenger agents and station agents; and approximately 3,100 are ramp and stores employees, who, among other duties, load, stow, unload, pick-up and deliver cargo, baggage and food, on, to and from aircraft at ramps and terminals, clean aircraft, maintain the ramp

area and equipment, and perform storeroom work (R. 15-16, 106-08).

The office-clerical and public contact personnel at United have never been organized for collective bargaining purposes. However, the ramp and stores employees have been organized as a separate group for over 20 years, and since 1948 have been represented by the International Association of Machinists ("IAM") (R. 16). On Capital Airlines, however, which in 1961 was merged into United, all three groups of employees had been represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Brotherhood") in a single bargaining unit or "craft or class." (R. 103.)

Case No. R-1706.

The combined craft or class at Capital arose out of a 1947 Mediation Board proceeding in which the Board found after hearing that the "clerical" craft or class of the railroads (consisting of all three groups described above) should be extended to the four air lines—not including United—in the case before it.[2]

The Board noted in its original determination that the "commercial airline industry is relatively new . . ." and "while there has been considerable development in collective bargaining in this field, there is but little uniformity among the several major airlines in the manner employees in the occupations here involved have aligned themselves for collective bargaining purposes." *Case No. R-1706*, 1 NMB Determinations 423, 432 (1947).

2. The airlines were National, Northeast, Mid-Continent, and Pennsylvania Central, the predecessor of Capital. The NMB brief correctly notes that United, which participated in the proceeding, supported that finding in 1947 (pp. 7-8), but fails to state that as early as 1949 United advised the Board that because of subsequent organizational developments the R-1706 determination would not be practical at United. R. 29, 57-58.

This determination was issued in January 1947, and was immediately attacked by the IAM and other labor organizations. The Board then held further hearings and in April 1947 reaffirmed its original determination with this admonition:

> "This affirmation should not be construed to prevent a reexamination of the craft or class provisions of the Railway Labor Act as applied to these categories of employees in any future air line representation disputes when, in the judgment of the Board, such reexamination will further the purposes of the Act." 1 NMB Determinations 445 (1947).

In 1953 the Board, in another craft or class determination, observed that five years had elapsed since its 1947 decision in R-1706 and stated:

> "In view of this and because of the expansion and growth of the airline industry during this period, as well as the development of representation of airline employees, the Board is of the opinion that upon proper application for its services under Section 2 Ninth [of the Railway Labor Act], at the appropriate time under its rules, it will be advisable to reexamine the determination in Case R-1706 et al., with the view of making such modifications as may be found to be justified at that time." *Case No. R-2357*, 2 NMB Determinations 66, 67 (1953.)

And in 1956 the Board did reexamine its R-1706 determination. It found that the entire "clerical" craft or class was represented as a single unit on only six airlines, while on 24 carriers—including American, Eastern, Pan American, Northwest, TWA and United—the R-1706 determination was not being followed. The Board then found as appropriate in the cases before it a separate craft or class of stock and stores employees, classifications formerly included within the catch-all of R-1706. *Case Nos. C-2252, C-2389*; 3 NMB Determinations 16 (1956).

As recently as December 1963—long after this litigation was started—the Board again refused to follow the 1947 R-1706 determination, and directed a separate election among a group of Eastern Air Lines employees over the contention of the IAM (a participant in the case) that the employees were part of the R-1706 classification. And despite the position of the Board in this case that a carrier cannot be a party to a craft or class proceeding, Eastern fully participated in that case. *Case R-3639*, December 5, 1963.

The Brotherhood Application.

On August 24, 1962, after the United-Capital merger, the Brotherhood invoked the services of the Board to investigate a representation dispute among United's "clerical, office, stores, fleet [ramp] and passenger [public contact] service" employees, excluding, however, those ramp and stores employees hired by United prior to August 24, 1962 (R. 31). The Brotherhood was apparently willing to leave the excluded employees to the IAM, which had represented them as a separate group since 1948, but wanted to include the ramp and stores employees hired after August 24, 1962 (who would otherwise be represented by the IAM). The Brotherhood application was docketed as NMB Case No. R-3590.

The IAM did not look kindly upon the Brotherhood's attempt to represent employees whom the IAM considered as its own and objected to the Brotherhood's application for Board services on the ground that it did not conform to the Board's 1947 determination. The Brotherhood charged that the IAM was "collaborating with the management," and in turn the IAM claimed the Brotherhood application was "a raid against the IAM." As a result the Brotherhood amended its application to cover the entire

"clerical" craft or class including all the ramp and stores employees represented by the IAM, whether hired before or after August 24, 1962 (R. 43, 47, 51, 138). The IAM accepted the challenge.

The Board, without further factual inquiry, acquiesced in the unit to which the two unions had agreed, although it was also apparently willing to proceed with an election among only the groups not previously represented by the IAM if the two unions would have agreed to that (R. 135, 138, 142). The bargaining unit thus created would have lumped together United's most highly skilled technical white collar employees and its least skilled common labor employees, including janitors. United's skilled blue collar workers—its mechanics—are members of a separate craft or class.

When the Brotherhood first invoked the Board's services, the Board also asked United to submit any statement it cared to make. In reply, United noted the Brotherhood's exclusion of employees represented by the IAM as of the date of the application, and asked the Board to dismiss the application. United added that if the Board should not dismiss the application, it "should then hold a public hearing to determine whether or not the proper craft or class is that expressed in prior determinations by the Board, or whether the proper craft or class is something other than that previously determined by the Board" (R. 39).

On January 11, 1963, after the Brotherhood amended its application, United again asked the Board to hold a hearing on the craft or class question. United called attention to the fact that on most airlines the R-1706 determination that all of these groups constituted a single craft or class had not been followed either on the carriers or by the Board (R. 55). The Board denied this request and a subsequent request for reconsideration, explaining that

the "two organizations which are parties to the dispute are in agreement . . ." (R. 71). The reasons assigned by the Board for its denial were:

> ". . . that the Carrier [United] is not a party to this matter, and also . . . that neither of the organizations who are parties to this case [IAM and Brotherhood] have made any request for a hearing on the question of craft or class. The Board, therefore, denied the request of United for such a hearing." (R. 99.)

The Form of the Ballot.

Concurrently with the correspondence relating to the matter of a hearing on the craft or class question, United requested the Board to alter its customary form of ballot to permit an employee to vote for "no union." United's request was based on legislative history, which it cited to the Board, showing that Congress intended employees subject to the Railway Labor Act to be free to vote for or against representation, and also on the analogy of the practice under the National Labor Relations Act which embodies the same statutory scheme (R. 73).

The form of ballot which the Board has used in the past and which it had planned to use in the United election does not contain space for a "no representation" vote as does the ballot used by the National Labor Relations Board (R. 101). The Mediation Board's practice is to provide space to vote only *for* the labor organization or organizations seeking representation rights, and an additional space to vote for "any other organization or individual" (R. 81).

A Mediation Board election is valid only if a majority of the eligible voters cast valid ballots. A majority of the valid ballots cast is sufficient to elect a representative. A ballot is valid only if cast *for* a representative. A ballot upon which is written "no representative" or which is cast blank by the voter is voided (R. 7). There is no way

for an individual employee opposed to representation by any union effectively to indicate his wishes, since if at least a majority of employees do vote, his failure to vote simply reduces the number of votes needed to elect a representative. The Board's form of ballot makes it possible for a minimum of 25% plus one of the employees to elect a bargaining representative for the entire craft or class, despite the desire of a majority of employees not to be represented by the labor organization so elected (R. 7-8).

The Board declined to change its form of ballot, stating that "introduction of a 'yes' or 'no' ballot would contribute to, if it did not actually encourage, an attempt to circumvent the mandate of Congress that representatives be designated by carriers and their employees. . . ." (R. 86).

On February 7, 1963, the Board wrote to United: "The Board will proceed with an election among the employees concerned in NMB Case No. R-3590 under the Board's usual policies and procedures in such cases." (R. 98.)[3]

Proceedings in the Courts Below.

United filed its complaint four days later, alleging in the first count, that it had been deprived of its rights under the Railway Labor Act and the due process clause of the Constitution by the Board's arbitrary and capricious acceptance of whatever craft or class was agreed upon by the labor organizations involved, and by the Board's refusal

3. Effective November 23, 1964, the Board changed its form of ballot to include a legend under the heading "Instructions for Voting," that "No employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified." This change was announced in a memorandum of November 6, which stated that the change was made "after consultation with the Solicitor General of the United States." This change does not cure the violation of the Railway Labor Act complained of here. See *infra*, pp. 47-55. (NMB Brief, 63-65.)

to hold a hearing addressed to the craft or class issue in which United as a party could produce evidence demonstrating the inappropriateness of the Board's craft or class determination (R. 4). The second count alleged that the form of ballot which the Board insisted on using was inconsistent with the employer's statutory duty to treat with the representative chosen by the majority of a craft or class of its employees, and invaded its right not to be required to bargain for a craft or class with a representative not desired by the majority (R. 6).

The complaint alleged that the composition of a craft or class of employees for collective bargaining purposes affected valuable property rights of an employer in the conduct of its business, and that the combining of the 12,700 employees performing work in many different and unrelated classifications, such as electronic computer operators, ticket agents, and cleaning women, into a single craft or class would have a substantial and adverse impact on the operations and cost of conducting United's business (R. 5).

The complaint sought to restrain the Board from holding the election unless the form of ballot was corrected and United was given a hearing as to the proper scope of the bargaining unit. The complaint did not seek judicial review of any substantive determination as to the scope of the unit, but only to compel the Board to make the determination in accordance with the requirements of the statute and of due process. Federal jurisdiction was based on 28 U. S. C. §§ 1331 and 1337.

Following the filing of the complaint, United moved for a preliminary injunction (R. 11), and the Board moved to dismiss the complaint or for summary judgment (R. 110). Affidavits were filed by both parties in support of their respective motions (R. 14, 103, 106, 111, 135, 142).

The District Court (per Judge Matthews) granted the Board's motion for summary judgment, and dismissed the complaint in a brief order which did not state any reason for the court's action and which found only that "there is no genuine issue of material fact." (R. 144.)

Shortly after the dismissal of United's complaint, a group of United employees filed a complaint in the District Court against the Mediation Board which attacked the form of ballot and the Board's refusal to grant the employees a hearing on the craft or class question. The Brotherhood intervened in support of the position of the Mediation Board. Judge Youngdahl issued a permanent injunction restraining the Board from conducting an election with a form of ballot which does not permit a voting employee to cast a vote against representation, and remanded to the Board for further consideration the employees' request for a hearing on the question of the appropriateness of the craft or class. *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, 218 F. Supp. 114 (Dist. Col., 1963).

United appealed from the dismissal of its complaint in this action, and the Board and Brotherhood appealed from the judgment entered by Judge Youngdahl. The three appeals were consolidated in the Court of Appeals. In a *per curiam* opinion, that Court affirmed the decision of Judge Youngdahl in the employees' suit, and also affirmed the dismissal of United's complaint in this case (R. 146).

The Court of Appeals noted that the grounds for dismissal of United's complaint were not stated in the district court's order, but stated that "as one of the grounds urged was lack of standing on the part of United Air Lines, we assume it was on this ground that the suit was dismissed." The Court then stated:

". . . The close question as to United's standing,

about which there is a dearth of authority, causes us concern. We have decided, however, not to disturb the District Court's dismissal, because our decision in the other two cases affords the relief concerning the form of ballot which United sought." (R. 148.)

United petitioned for rehearing (R. 157), pointing out that although the action of the Court of Appeals in affirming Judge Youngdahl's order may have resolved the ballot question it left completely unanswered the issues relating to United's right to be heard on the craft or class question and the Board's duty in making such a determination. The petition requested the Court, therefore, to decide the "close question" of United's standing. This petition was denied on April 14, 1964 (R. 157).

SUMMARY OF ARGUMENT.

Although it has been assumed that United's complaint was dismissed on the ground that United "lacks standing to maintain this action," the government brief agrees that the question whether a carrier has a right to participate in National Mediation Board craft or class determination "is presented for decision in this litigation." United's complaint asserted that the craft or class determination affected valuable property rights, was made arbitrarily without hearing, and hence was a denial of its right to due process; accordingly a clear basis for judicial standing was asserted.

I.

The Railway Labor Act imposes an enforceable obligation on a carrier to bargain with a representative chosen by a majority of its employees in a craft or class determined under the statute. Compliance with the Railway Labor Act is a condition of holding a certificate of public convenience and necessity by an air carrier under the Federal Aviation Act of 1958. United has a direct and substantial interest in the scope of the craft or class, and is entitled to procedural due process in the manner by which it is determined.

A. Combining the three diverse classifications of office-clerical employees, public contact employees, and ramp and stores employees into a single bargaining unit will have a substantial and adverse impact on United's operations and cost of doing business. Such a unit would include such unrelated jobs as computer operators, ticket agents, and cleaning women. The hiring qualification and duties for

each of the three general categories differ. There is no cross-training, cross-utilization or community of interest among them. Such a unit is inconsistent with the Mediation Board's own statement that the craft or class should reflect "the functions, duties and responsibilities of the employees" and the "community of interest between jobs." The manner in which the employees are grouped affects bidding and transfer rights and where the classifications are unrelated, may require constant retraining and utilization of employees not hired for or qualified for jobs into which they exercise these rights. The experience of Capital Airlines with this diverse craft or class demonstrates that the potential harmful impact on a carrier is not speculative.

B. Since United does have a substantial property interest in the composition of the bargaining unit, and since its statutory duty to bargain with a representative for such a unit is judicially enforceable, United is entitled to procedural due process in the method by which such bargaining unit is determined.

Prior decisions of this Court have recognized an employer's constitutional right in regulations affecting its labor relations, including determinations of bargaining units.

There is no administrative enforcement procedure in which this right can be protected, no statutory provision for judicial review of the craft or class determination, and no opportunity to challenge the determination in an enforcement proceeding before the Civil Aeronautics Board under the Federal Aviation Act of 1958. Accordingly, the requisite due process can only be satisfied before the Mediation Board in the initial proceeding establishing the craft or class.

II.

A. Although the Railway Labor Act does not define the phrase "craft or class," the legislative history of the 1934 amendments which added the election procedures to the Act, and of the Wagner Act adopted in the following year, makes clear that the duty to determine crafts or classes was imposed on the Mediation Board. It was not the intent of the Railway Labor Act to give to employees the right to determine their own bargaining units, but only the right to select a representative for the bargaining unit once it was determined. The government contention that this was a right given employees is, in any event, irrelevant, since agreement here was by opposing labor organizations, which even together may not represent the agreement of all or a majority of the employees. The Board was unwilling to consider the views of either United or the unorganized employees.

B. The Board did not make a determination of craft or class in this case on the basis of any evidence or findings. It accepted the craft or class agreed upon between the two unions and refused United's request for a hearing for the expressly stated reasons that neither of the two competing labor organizations had requested a hearing and because in the Board's opinion United "is not and cannot be a party to this representation dispute."

The Board position confuses the issue of the breadth of the craft or class with the identity of the representative of that class once the unit is determined. The former determination is the duty of the Board; the latter is the right of the majority of the employees. The courts have recognized and the Mediation Board has insisted upon this distinction in prior craft or class litigation. It has told this Court that Congress has charged the Board with the "duty to find the craft or class to be

whatever it is, not what it used to be." For this reason, the Board's claim that it did exercise its independent judgment and discretion in this case because it adhered to a 1947 craft or class determination does not demonstrate a discharge of its obligation as it itself has defined it. It has not in the past adhered to the 1947 determination, and when it has heard evidence—including that of carriers—has modified its position in prior cases. Its non-reliance on the 1947 determination is further evidenced by the fact that the Board was willing, as the record shows, to consider a different craft or class in this case if the two rival labor organizations had agreed to that. The Board's determination was, therefore, an "arbitrary fiat," and not the "result of a process of reasoning." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 136 (1951).

C. The government's assertion of a prior consistent construction of the Railway Labor Act by the Board as precluding carrier participation is not supported by past Board action. Employers participated in ten of the eleven air carrier craft or class determinations reported by the Board from July 1953 to June 1961. In the eleventh case it had been stipulated that the result would be the same as in a companion case in which the carrier did participate. In a number of these cases the only participants were a single labor organization and the carrier. In others, the Board clearly separated the question of craft or class from that of identity of the representative of the craft or class, a distinction it ignores here.

D. Employees and labor organizations have no greater rights under the Railway Labor Act respecting the craft or class question than does a carrier. There is no statutory or constitutional basis for the Board's refusal to hold a hearing on that question because the two labor organizations agreed on the craft or class.

III.

Switchmen's Union v. *National Mediation Board*, 320 U. S. 297 (1943), is no bar to the relief sought here. That case held that craft or class determinations of the Mediation Board are not subject to judicial review. United does not seek judicial review of the substantive merits of a Board craft or class determination, but only a declaration that the Board must make that determination on the basis of evidence and in accordance with United's right to procedural due process. *Switchmen's Union* reserved constitutional questions: "all constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." 320 U. S. 297, 301. United's right was not created by Congress, but rather was limited by Congress; hence even if judicial review were sought here *Switchmen's Union* would be no bar. This Court also stated, the same day it decided *Switchmen's Union*, that it was not then deciding whether judicial power may be exerted to require the Mediation Board to exercise its duty under Section 2 Ninth of the Railway Labor Act—the statutory provision here involved. *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 336 n. 12 (1943). This case involves the Board's obligation under the Constitution and the statute to exercise its duty to make a craft or class determination and to use fair procedures in so doing. *Switchmen's Union* does not prevent the exercise of judicial power to compel the Board to act.

IV.

The Mediation Board ballot does not provide a space for an employee to cast a valid ballot for no representation. The Mediation Board contends that he can express this desire by not voting at all since not voting is equivalent to voting no.

Section 2 Fourth of the Railway Labor Act provides that the majority of any craft or class of employees shall have the right to determine the representative of the craft or class. Certification of a representative on the basis of a majority of the votes cast, rather than a majority of the total eligible voters, was upheld on the ground that the non-voters are "presumed to assent to the expressed will of the majority of those voting." *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937). Thus the Mediation Board contention that not voting is equivalent to voting no is completely contrary to the rationale of the *Virginian* case that not voting is equivalent to assenting to the will of the majority of those voting.

The National Labor Relations Board has allowed space for a "no" vote since the *Virginian* case. The relevant provision of the Wagner Act was modeled after Section 2 Fourth of the Railway Labor Act. The Wagner Act provision was re-enacted by Congress in 1947 without change after ten years of consistent NLRB practice of allowing a "no" vote, while Congress has had no occasion to look at Section 2 Fourth since 1934. The purpose of the two statutes is the same—the encouragement of collective bargaining—and the difference in treatment is not explicable on that ground.

The form of ballot was changed by the Mediation Board on November 23, 1964, after consultation with the Solicitor General, to include on its face a legend that the employee need not vote, and that no representative will be certified unless a majority of the eligible employees participate. The government brief describes the prior form of ballot as "unfair." The change, however, does not cure the basic defect, since until it is possible for an employee to cast a ballot for no representation, no valid conclusions about the desires or presumed desires of a majority of the employees can be drawn from the results of a Board-conducted elec-

tion. For non-voting cannot at the same time be presumed to be the equivalent of voting no and of assenting to the will of the majority of those who do vote. If the Board thinks now that not voting is the equivalent of voting no, it should place a space on its ballot for such an expression and end what it must think is litigation of a pointless issue.

ARGUMENT.

INTRODUCTION.

One of the grounds asserted by the Board in its motion to dismiss United's complaint was that United "lacks standing to maintain this action." (R. 110.) Although Judge Matthews' order dismissing the complaint stated no reasons, it was assumed by the Court of Appeals that this ground of lack of judicial standing was the basis for her action (R. 148). Judge Youngdahl made the same assumption in his memorandum opinion in support of his order granting a preliminary injunction in Nos. 138 and 369 (R. Nos. 138 and 369, 133 Fn. 1).

The courts below accepted the argument that United had no judicial standing to challenge the Board's position that an employer subject to the Railway Labor Act lacks administrative standing to be heard on the question of craft or class. This effectively blocked any judicial examination of the propriety of the Board's evaluation of its own obligation under the Act as well as the merits of United's complaint that its constitutional right to procedural due process was being violated by the Board.

The judicial standing argument really "confuse[d] the merits of the controversy with the standing . . . to litigate them." *City of Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357 U. S. 77, 83 (1958). For how could it ever be determined if the Board was right or wrong in its position on United's administrative standing—*i.e.*, United's right to be heard on craft or class questions—if United had no judicial standing to litigate the question?

United's complaint alleged that the craft or class determination by the Board affected valuable property rights

in the conduct of its business and that it was made arbitrarily and capriciously, without hearing or consideration of its effect on United, and was a denial of United's right to due process (R. 3-10). Thus a clear basis for judicial standing was stated. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407 (1942); *National Motor Freight Traffic Ass'n.* v. *United States*, 372 U. S. 246 (1963).[4]

In its brief to this Court, the government now seems to agree that United has the right to present to a court the question of its administrative standing. ". . . We agree with United that the question whether a carrier has a right to participate in employee representation proceedings under Section 2, Ninth of the Act is presented for decision in this litigation." (NMB Brief, 43-44.) The characterization "employee representation proceedings" begs the issue somewhat, since one of the questions here is whether a craft or class determination is solely a matter of employee interest. The government states it more accurately in its Questions Presented as "whether a carrier has a right to participate in a National Mediation Board representation proceeding." (NMB Brief, 2.)

On the merits of the issue of United's right to be heard before the Board on craft or class questions, the government offers two basic but contradictory arguments. First, it says that the Railway Labor Act leaves the determination of craft or class questions exclusively to the employees, hence the employer has no legally recognized interest which entitles it to be heard on the question (NMB Brief, 44-45).

4. See also *Greene* v. *McElroy*, 360 U. S. 474 (1959); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951); *Atchison, Topeka and Santa Fe Ry. Co.* v. *Summerfield*, 229 F. 2d 777 (C. A. D. C., 1955), cert. den. 351 U. S. 926 (1956); *Friend* v. *Lee*, 221 F. 2d 96 (C. A. D. C., 1955); *B. F. Goodrich* v. *FTC*, 208 F. 2d 829 (C. A. D. C., 1953); *Premier Peat Moss Corp.* v. *United States*, 147 F. Supp. 169 (D. C. N. Y., 1956), aff'd per curiam 355 U. S. 13 (1957).

The implicit conclusion, though one which the Board has never explicitly stated, is that since the Brotherhood and IAM agreed on a craft or class in this case, the matter is at an end and the Board itself has no function in the process and no legal interest of United has been affected. The government argument does not explain, however, why the agreement of two labor organizations necessarily reflects the agreement of the affected employees. The second argument is that the Board did in fact meet the obligation imposed upon it by the Railway Labor Act to make craft or class determinations and decided "to adhere to the craft lines drawn in 1947." (NMB Brief, 60.) The conclusion from this is that such a determination by the Board is not subject to judicial review under the doctrine of *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) (NMB Brief, 60).

The Board does not discuss the constitutional question raised in United's petition.

We shall argue with respect to the craft or class question that United has a constitutionally protected right to procedural due process in the manner by which its employees are grouped for collective bargaining purposes; that the Railway Labor Act is consistent with this right in that it does not delegate to employees the power to make craft or class determinations but imposes that duty on the National Mediation Board; that the National Mediation Board did not exercise its duty here, and that *Switchmen's Union* is no bar since United seeks only the right to have the Board hear and consider its evidence respecting the appropriate craft or class of its employees, and is not seeking judicial review of any substantive determination of the Board.

With respect to the ballot issue, we will demonstrate that the form of ballot used by the Board does not assure

that the desires of a majority of the employees will be, or can reasonably be presumed to be, reflected in the results of a Board-conducted election, and therefore is inconsistent with the majority rule principle established by the Railway Labor Act.

I.

UNITED HAS A SUBSTANTIVE INTEREST IN THE COMPOSITION OF A UNIT OF EMPLOYEES WITH WHICH IT MAY BE REQUIRED TO BARGAIN UNDER THE RAILWAY LABOR ACT AND IS THEREFORE ENTITLED TO PROCEDURAL DUE PROCESS IN THE MANNER BY WHICH THE UNIT IS DETERMINED.

The federal labor relations statutes require that an employer bargain with a representative chosen by a majority of its employees in a bargaining unit or craft or class determined under the statute, under compulsion of legal sanctions. This obligation is enforceable under the National Labor Relations Act through a statutory enforcement procedure and under the Railway Labor Act through the general judicial equity power. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937). A certificated air carrier—like United—is subject to further sanctions since compliance with the Railway Labor Act is a condition of holding a certificate of public convenience and necessity under Section 401(k)(4) of the Federal Aviation Act of 1958. 72 Stat. 756-7, 49 U. S. C. § 1371(k).

United's position is that the direct and substantial interest of an employer in the composition or structure of a collective bargaining unit of its employees entitles the employer to procedural due process in the manner by which the unit is determined. This right has always been accorded to employers subject to the National Labor Relations Act and, as we will show, there is no inherent difference between that statute and the Railway Labor Act in

this respect. The source of this right is not statutory but constitutional since an employer—like any person—has the right to be free of arbitrary restraint in the pursuit of its business and in its freedom of contract.

This is not to argue—nor do we—that United is not subject to federal regulation of its labor relations, nor that it may not be required to bargain with a representative selected by a majority of its employees in a craft or class determined under the Railway Labor Act. We do contend that such regulation must be consistent with procedural due process, and that the Mediation Board may not impose a craft or class upon United arbitrarily or capriciously.

A. United's Interest in the Craft or Class.

United's substantial interest in the craft or class is clearly established by the record here. The complaint and affidavits are unchallenged, and Judge Matthews found there was no genuine issue of material fact (R. 144).

United's complaint alleged that the composition of a craft or class of employees for collective bargaining purposes affects valuable property rights of United in the conduct of its business, and that the combining of employees in such unrelated classifications as electronic computer operators, ticket agents and cleaning women into one craft or class will have a substantial and adverse impact on the operations and cost of conducting United's business (R. 5). United's affidavits detailed how such a craft or class is inconsistent with its organizational structure, and the effect such a craft or class would have on the business of United, its efficiency and its ability properly to perform its public service function.

There are different hiring qualifications for each of the groups. Ramp and stores employees are primarily male,

their duties involving essentially physical labor; they need not have the training and education required of clerical or public contact employees. The clerical personnel are primarily female, perform little physical work and rarely deal with the public. Public contact employees are of either sex and their work requires personality and appearance standards which are not relevant to the clerical or ramp and stores employees. There is little inter-group identification and no community of interest, cross-training, or cross-utilization among them. Combining these diverse classifications—totaling 12,700 employees located in 100 cities throughout the country—into a single bargaining unit tends to impair the morale of the higher rated employees, and disrupts the company's organizational efficiency (R. 16-17, 24-26, 106-108). Such a unit conflicts with the Mediation Board's own statement that the craft and class should reflect "the functions, duties and responsibilities of the employees," and the "community of interest existing between jobs." (R. 28.)

In the courts below, the Board did not deny the existence of these problems or attempt to minimize them. It acknowledged that United would be "exposed to hard bargaining which may increase its labor costs and complicate its personnel problems." NMB Brief in Court of Appeals, 33. It suggested that United could solve these problems through the manner in which it negotiated a collective bargaining agreement. But the obligation to bargain collectively with the entire craft or class as a single unit makes remote the possibility that the employer can preserve a rational personnel structure. For the very concept of "craft or class" implies community of interest among the employees in the unit. Its effect is to make the employer's organizational structure conform to the "craft or class" rather than the reverse. Issues such as seniority, transfers, job posting and bidding rights tend to be common

to the entire craft or class, and if the craft or class does not reflect a rational basis of classification the result may have serious economic consequences.

That this is not a speculative result appears from the affidavit of C. P. Hutchens, who was the Director of Personnel for Capital Airlines prior to its merger into United. That affidavit described the serious impact on Capital resulting from a single collective bargaining agreement for the "clerical" craft or class made up of so many and diverse job classifications, including the cost of employee retraining and impairment of employee morale and efficiency as the result of transfers from and into classifications having no functional similarity (R. 103-5).

Aside from its impact on the conduct of United's business, this craft or class determination has obvious impact on United's right to freedom of contract. Here, for example, the craft or class determination poses the substantial probability that United will no longer be able to bargain separately with its ramp and stores employees—part of the craft or class established here—as it has with the IAM since 1948. For once a representative for the craft or class is selected, United will be under an obligation to bargain with that representative for that craft or class, and with no other representative for any of the employees in that craft or class. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 548 (1937).

B. The Constitutional Right.

United does not contend that these factors preclude the Board from imposing a craft or class upon it. But since United does have a substantial interest in the composition of the craft or class, the determination must be rationally made and United must be accorded procedural due process in the method by which it is made. Its concern in this ad-

ministrative decision is of no different order from the concern of a regulated party in administrative decisions establishing the rent he may charge his tenant, or the minimum wage he must pay his employees, or the rates he may charge for fire insurance. All of these interests are entitled to due process protection in the manner in which they are regulated. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (1941); *Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F. 2d 281 (C. A. D. C., 1948). See also *La Cross Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949).[5] Such regulation acts directly and through the force of federal sanction, unlike the indirect competitive effect complained of in cases such as *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

United, being "affected by the determination of an administrative body," is "entitled to insist" upon compliance "with the requirements of due process." *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 182 (1938).[5a]

5. In *La Cross* the interest of an employer in a bargaining unit determination was clearly recognized. The Court held that the power given employees under the Wisconsin act to designate their own collective bargaining units conflicted with the federal statute which left that issue to the National Labor Relations Board. The Court held that the certification "established legal rights and relationships," and "told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions." The Court held that the character of the certification was, therefore, reviewable at the instance of an employer even though the certification was enforceable only through another proceeding. 336 U. S. 18, 23-24.

5a. The determination considered in *Shields* was that of the Interstate Commerce Commission in finding that the respondent railroad was not an interurban electric railway. The consequence of this determination was that the railroad became subject to regulation under the Railway Labor Act, electric interurban railways being excepted from the coverage of that statute. The ICC was authorized to make such a determination, after hearing, upon application of the Mediation Board. The Court held that the ICC determination was within the agency's authority, and that the rail-

The constitutional interest of an employer in regulations affecting its labor relations has always been recognized by this Court, and in fact, has been assumed without question. Constitutional attacks in this area have been entertained and disposed of not on the ground that no constitutional right was involved but rather that the limitation imposed was not an unreasonable restraint on the employer's right to carry on its business. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570 (1930); *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 541, 557-8 (1937); *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 43-44 (1937).

That this constitutional interest includes the right to due process in bargaining unit determinations is established by *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146 (1941), a case arising under the Wagner Act prior to the 1947 Taft-Hartley amendments referred to in the Board's brief (NMB Brief, 50). There the employer objected on constitutional grounds to a decision of the National Labor Relations Board which included one of its plants in a larger collective bargaining unit which the NLRB had found appropriate after "extensive hearings." The basis of the employer attack was that the NLRB procedure denied due process of law, that there was no substantial evidence to justify the ruling, and that the authority granted the NLRB to make such determinations was an unconstitutional delegation of legislative power.

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road was not entitled to a trial *de novo* in the district court. In commenting on the Congressional requirement of a hearing, the Court stated: "And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist." 305 U. S. 177, 182. The *Shields* case was distinguished in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 306-7 (1943), but *Switchmen's Union* reserved constitutional questions. See *infra*, pp. 44-6.

This Court gave full and serious consideration to every constitutional argument raised by the employer. It examined in detail the charges that the NLRB hearing deprived the employer of a "full and fair hearing as guaranteed by the Fifth Amendment" because of the refusal to admit certain tendered evidence (313 U. S. 146, 154-163), and concluded that the excluded evidence, even if admitted, could not have affected the outcome of the unit question. The Court, at the instance of the employer, examined the legislative standards imposed on the NLRB as a guide to its administrative action respecting unit determinations and found them to be adequate and not an unconstitutional delegation of legislative authority. The *Pittsburgh Plate Glass* case clearly established that an employer has an interest in fair procedures and adherence to constitutional standards in bargaining unit proceedings.

If the Congressional delegation in *Pittsburgh* had been to private parties—such as labor organizations or groups of employees—with no standards other than their voluntary act, then certainly serious doubt about the constitutionality of the statute would have been raised. This is precisely what the Board brief says Congress did under the Railway Labor Act. If the Board were correct in this view, we would suggest that the Railway Labor Act was to this extent invalid as an improper delegation of legislative power.[6] However, as we show below, the power to determine crafts or classes was not delegated to private parties under the Railway Labor Act.

Due process requires that United is entitled to a hearing at some point on the question of the appropriateness of the

6. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 318 (1936). The holding in *Carter*, that it was an unconstitutional delegation of legislative power to give mine operators and employees the right to establish maximum hours and minimum wages which then became binding with the force of law on other employers, has not been overruled despite the fate of other aspects of that decision.

scope of the unit of its employees for which it is required to bargain under threat of legal sanction, including the possible loss of its certificate of public convenience and necessity. There is no administrative enforcement procedure under the Railway Labor Act in which the requisite hearing could take place, as there is under the National Labor Relations Act. See *NLRB* v. *Ideal Laundry and Dry Cleaning Co.*, 330 F. 2d 712 (C. A. 10, 1964).[7] In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), this Court held that craft or class determinations of the Board were not subject to judicial review; hence due process cannot be satisfied through a subsequent judicial hearing as in *Bowles* v. *Willingham*, 321 U. S. 503, 519-21 (1944).[8] And if proceedings were started against United before the Civil Aeronautics Board under the Federal Aviation Act for failure to comply with the Railway Labor Act, United could not defend on the ground that its due process had been violated by the Mediation Board because the propriety of the designation of a bargaining representative by the Mediation Board is not open to question by the C. A. B. in such a proceeding. See *South-*

7. "The appropriateness of the bargaining unit is the salient issue in this unfair labor practice proceedings, and respondent [employer] is, to be sure, entitled to a due process hearing on that issue. And, if an opportunity for a full hearing on the critical issue was not afforded in the representation proceedings, respondent is entitled to be heard in this unfair labor practice proceedings." 330 F. 2d 712, 715. See also *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710 (1945): "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

8. In *Bowles*, the delay of due process until after administrative action became effective was justified on the grounds of the exigencies of war. ". . . Where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." 321 U. S. 503, 521.

ern Pilots Ass'n v. *C. A. B.*, 323 F. 2d 288, 290 (C. A. D. C., 1963), cert. den. 376 U. S. 954 (1964).[9]

Thus the only time and place at which United's right to procedural due process in the determination of the appropriate craft or class can be satisfied is before the Mediation Board in its proceedings under Section 2 Ninth of the Railway Labor Act. Consequently, the Board's position that United cannot become a party to such a proceeding is constitutionally in error.

If the Railway Labor Act compelled such a result it would to this extent be unconstitutional. But as we shall demonstrate in the next section of this argument, Congress did not intend that the craft or class issue would be delegated to labor organizations or could be arbitrarily determined by the Mediation Board.

II.

BY ACCEPTING WITHOUT INDEPENDENT INQUIRY THE BARGAINING UNIT AGREED UPON BY TWO UNIONS, THE MEDIATION BOARD FAILED TO EXERCISE THE DUTY IMPOSED UPON IT UNDER THE RAILWAY LABOR ACT.

A. The Statutory Plan.

The Railway Labor Act was substantially amended in 1934—the year before the passage of the Wagner Act—by the addition, *inter alia*, of the election procedures of Section 2 Ninth. 48 Stat. 1188.

9. For this reason, among others, United's action here is not premature, for once the Mediation Board proceeding is concluded United can resist only at the risk of jeopardizing its certificate of public convenience and necessity under the Federal Aviation Act. The prematurity argument, raised by the Board in the district court, has been abandoned here.

Section 2 Fourth of the Act provided, in part, that:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Machinery for determining the representative of the craft or class is established in Section 2 Ninth, which does not further elaborate on the meaning of the phrase, but provides that upon certification of a representative by the Mediation Board, "the carrier shall treat with the representative so certified as the representative of the craft or class."

The amendments contain no definition of craft or class. Commissioner Eastman, their draftsman,[10] testified during the Congressional hearings that some thought had been given to this but he felt "there would be no difficulty in determining what is a craft or class of employees," and if there were any question it would be decided by the Mediation Board. Hearings on H. R. 7650, House Comm. on Interstate and Foreign Commerce. 73d Cong. 2d Sess. 1934, pp. 45, 57-58.

The following year, during consideration of the bill leading to the Wagner Act, the subject of bargaining unit determination was again raised. The Wagner Act provided specifically that the National Labor Relations Board was to make unit determinations. In commenting on this section of the bill, the House Report stated:

> "Section 9(b) provides that the [National Labor Relations] Board shall determine whether, in order to effectuate the policy of the bill (as expressed in Sec-

10. Commissioner Eastman's views have been accepted as authoritative. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 302 (1943).

tion 1), the unit appropriate for the purposes of collective bargaining shall be the craft unit, plant unit, employer unit, or other unit. The matter is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial governmental agency, the Board, to make that determination. *There is a similar provision in the Railway Labor Act of 1934 (Sec. 2(9); 2(4)).*" H. Rep. No. 969 on H. R. 7978, 74th Cong. 1st Sess. 1935, p. 20. (Emphasis added.)

The Senate Report pointed out that employees could not choose their own bargaining units, since this determination had to precede a determination of what employees could participate in any kind of choice. And in this respect, the Railway Labor Act was considered to be similar to the National Labor Relations Act.

> "Obviously there can be no choice of representatives and no bargaining unless units for such purposes are first determined. *And employees themselves cannot choose these units,* because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.
>
> "This provision is similar to Section 2 of 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—
>
> > " 'In the conduct of any election for the purpose herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election.' " S. Rep. No. 573 on S. 1958, 74th Cong. 1st Sess. 1935, p. 14. (Emphasis added.)

Thus the legislative history clearly establishes that it is the duty of the Mediation Board—not the right of employees—to establish crafts and classes. This duty was confirmed in *Switchmen's Union:* ". . . The authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is no less clear

and no less essential to the performance of its duty." 320 U. S. 297, 305 (1943).

The government suggests in its brief that if employees agree on the craft or class this must be accepted, and in that circumstance the duty of the Mediation Board under Section 2 Ninth does not come into play unless there is disagreement as to the identity of the representative. (NMB Brief, 44.) This argument, interestingly enough, was first made by a carrier in a Mediation Board proceeding under Section 2 Ninth who saw that if this were so then it could not be compelled to treat with the representative for such a craft or class. For the carrier's duty to treat with a certified representative only arises under Section 2 Ninth of the Act, and if there is no dispute under that section then there can be no certification and hence no enforceable duty.

The Board rejected this ingenious argument:

> ". . . If the theory advanced by the carrier were adopted, the more nearly employees were unanimous in their choice of representatives the more powerless the Board would become to certify the fact of their choice. In order for the employees to secure representation rights in such a situation it would be necessary for them to artificially create a dispute by injecting another contender for representation to secure services of the Board and a certification. This clearly is contrary to the Act which was enacted to promote peaceful settlements not foment disputes." *Northwest Airlines, Case No. R-2107*, 2 NMB Determinations 19, 22-23 (1948).

In any event, the government's argument is irrelevant. Here there was no agreement among *employees* as to the craft or class, but agreement among *labor organizations*—which may or may not reflect the agreement of the employees. The Mediation Board recognizes the distinction. Thus if representation is being sought for the first time by a single labor organization, the Board does not assume

there is agreement among the employees because no other labor organization seeks representation rights, but assumes rather that "the dispute is between those who favor having a representative as opposed to those who are either indifferent or are opposed to having a representative for the purposes of the act." 29th NMB Annual Report (1963), p. 35.[11]

It is not surprising, therefore, that the government's brief does not draw the conclusion its argument implies; that since two labor organizations agreed on the craft or class the Mediation Board has no craft or class determination function under Section 2 Ninth.[12] Rather the government subsequently argues that the Mediation Board did in fact exercise its statutory duty to make a craft or class determination (NMB Brief, 60).

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11. Why the employees "opposed to having a representative" are not also parties to the dispute when more than one labor organization seeks representation rights—as do the IAM and the Brotherhood in this case—is not apparent. Yet the Board seems to draw this distinction and has expressly denied any rights to such employees in Nos. 138 and 369.

12. The government refers to the proviso to the definition of "employees" in Section 1 Fifth of the Railway Labor Act that no occupational classification by order of the ICC "shall be construed to define crafts or classes according to which railway employees may be organized by their voluntary action" in support of its argument (NMB Brief, 46). The purpose of the proviso was obviously to make possible the preservation of bargaining arrangements already entered into between labor organizations and carriers on a voluntary basis. The proviso implies no limitation on the power of the Board itself. This view is supported by the Board. "So far as possible the Board has followed the past practice of the employees in grouping themselves for representation purposes and of the carriers in making agreements with such representatives. But these practices have not always been uniform and claims are often made that the Railway Labor Act requires changes in existing practices." *Administration of the Railway Labor Act by the National Mediation Board, 1934-57* (1958), p. 20.

Neither Brotherhood, in its Brief in No. 138, nor the Railway Labor Executives Association, which filed an *amicus* brief in Nos. 138, 139 and 369, claims the right for employees which the government suggests, although Mr. George M. Harrison whose testimony is quoted by the government to this point (NMB Brief, 54-56) is now the chief executive officer of Brotherhood.

B. The Arbitrary Exercise of the Board's Duty.

The record clearly establishes that the Board conducted no investigation, held no hearing, accepted no evidence and made no findings respecting the appropriateness of the craft or class at United. It accepted the unit on which the two unions had drawn the battle lines and refused United's request for a hearing. The reasons for this denial were clearly and repeatedly stated by the Board: neither the IAM nor the Brotherhood "have made any request for a hearing on the question of craft or class," and "in the Board's opinion the carrier is not, and cannot be, a party to this representation dispute." (R. 99, 114; see also R. 65, 71, 85.)

This position simply confuses the issue of craft or class with the issue of the identity of the representative of that class once the unit is determined. The former is the Board's business—as the preceding section clearly shows. The selection of the representative for the designated unit is the business of a majority of the employees from which the employer is properly excluded. But excluding the employer from the selection of the representative does not warrant excluding him from the determination of the scope of the bargaining unit in which he has a substantial interest.

The distinction which the Board fails to draw here was clearly seen by it and the courts in the litigation arising out of the successful effort of the Air Line Pilots Association to extend its bargaining rights at United to include flight engineers as well as pilots. The flight engineers had been separately represented since 1949, and by the same union—Flight Engineers International Association—continuously since 1951. The Mediation Board acting through a committee appointed under Section 2 Ninth, held, after extensive hearings in which United participated, that the combined unit was appropriate and should be voted together on one ballot. *Case No. C-2946*, 3 NMB Deter-

minations 56 (1961). Since the pilots outnumbered the flight engineers by more than two to one, it was apparent that the Air Line Pilots Association would win the election with no difficulty. The Flight Engineers sought an injunction to prevent the holding of the election, on the ground, among others, that the Mediation Board had no authority to change the craft or class which the flight engineers themselves had organized and which had been recognized for over ten years.

The Court of Appeals, in affirming the dismissal of the complaint, agreed that the right of the employees extended only to the selection of the representative and not to the determination of the craft or class.

> "Under the Railway Labor Act only the NMB (or the committee designated by it) has the power to make craft or class determinations . . . The right given to employees is that of designating, by a majority of those comprising a 'craft or class,' their representatives." *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 905, 908 (C. A. D. C., 1961), cert. den. 368 U. S. 956 (1962).

The Mediation Board's view of its power and duty to make craft or class determinations on the basis of relevant evidence was clearly stated to this Court in the Board's brief in opposition to the Flight Engineers Association petition for a writ of certiorari in the *UNA Chapter* case:

> "On the merits, petitioner's objections are equally unavailing. In essence it claims that once a craft or class is recognized it may not change. Petitioner relies on the fact that it represented the flight engineers in past bargaining with the carrier. However, *Congress has charged the Board (or its Committee) with a duty to find the craft or class to be whatever it is, not what it used to be.* Where employees—such as pilots and flight engineers in this age of jets—change in function, duties, interests, skills and responsibilities

> as a result of technological development in the industry, *the Board must recognize the change.* Notwithstanding petitioner's assertions, the Board neither destroyed nor created a craft or class. Pursuant to the directive of Section 2, Ninth, of the Railway Labor Act, it made a finding that there is today an existing craft or class of flight deck crew members." (Brief in Opposition of National Mediation Board, Supreme Court No. 531, October Term, 1961, pp. 13-14. Emphasis added).

Nothing in the Railway Labor Act or in the Board's statement to this Court of its duty under the Act justifies the failure of the Board to make a rational determination of the craft or class here solely because two competing labor organizations agreed on how to split up United's employees. It may well have been that if the Board had heard United's evidence concerning the impact of electronic computers on reservations systems, record keeping and billing and the resulting "change in functions, duties, interests, skills and responsibilities" of its employees, it might have found another craft or class appropriate despite the agreement of the IAM and the Brotherhood. As the Board has elsewhere acknowledged, ". . . In the Board's investigation of such matters under Section 2, Ninth of the Act, it must rely on the carrier for information needed in considering the dispute." *Eastern Air Lines,* NMB Case No. R-3639, p. 3, December 5, 1963.

The government suggests in its brief that the Board did exercise its power by its "decision to adhere to the craft lines drawn in 1947." (NMB Brief, 60). Even if that were true, decision on that ground would fly in the face of the Board's statement to this Court in the *UNA Chapter* case that Congress charged it "with a duty to find the craft or class to be whatever it is, not what it used to be." As we have shown, *supra,* pp. 4-6, the Board has not followed R-1706 blindly in other cases in which it has heard evidence of the circumstances at the carrier involved, and

has refused to follow that classification as recently as December 1963 in the *Eastern Air Lines* case. The Board has attempted to explain its deviation from R-1706 on the grounds of "unique circumstances" in these other cases (R. 118). Perhaps if the Board had held a craft or class hearing in this case it might have discovered that here, too, the circumstances were "unique."

The fact is the Board did not rely on R-1706 in this case. Affidavits in this proceeding demonstrate that the Board was prepared to accept a different craft or class if the two labor organizations had agreed to a different unit. Included as an exhibit to one of these affidavits is a letter from the IAM to the Brotherhood, sent after the latter amended its application to include employees then represented by the IAM. In this letter the IAM commented on the possibility of the craft or class being again amended to exclude the IAM-represented employees. The letter states:

> "After discussing this matter further with the National Mediation Board, we were assured that if an agreement could be reached between your Organization and our Organization, which would exclude all employees in the craft or class presently represented by our Organization, the Board would conduct an election among the remaining employees in the craft or class without establishing a precedent that could be used by any other organization on any other property." (R. 139.)

The affidavit of Board Member O'Neill filed in opposition to this affidavit concedes that a discussion did take place between Mr. O'Neill and the writer of the IAM letter, and states that he advised the IAM representative that if the two unions agreed to exclude the ramp and stores employees from the craft or class, "the Board would give consideration to that situation . . ." (R. 142.)

Mr. O'Neill's affidavit is a frank admission that the Board was prepared to act on the basis of any agreement between the two unions, without regard to R-1706 or to the exercise of its own judgment and certainly without regard to any objective criteria.

The complaint alleged that the determination was arbitrarily and capriciously made without any hearing and without consideration of its effect on United. The record clearly supports the conclusion that the Board simply accepted the grouping agreed upon by the two unions and made no independent inquiry or determination.

This Court has elsewhere commented upon administrative determinations arbitrarily and capriciously made:

> "The Executive Order contains no express or implied attempt to confer power on anyone to act arbitrarily or capriciously—even assuming a constitutional power to do so . . . An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 136 (1951).

C. Carrier Participation in Prior Representation Proceedings.

The government contends that since 1935 the Board has consistently construed the 1934 amendments to the Railway Labor Act as precluding carrier participation in representation proceedings, and urges this as a reason for supporting the Board's position here (NMB Brief, 57-58).

The fact is we know of no other major airline case in which the Board has not permitted carrier participation in craft or class proceedings. Carriers have participated in ten of the eleven airline craft or class determinations re-

ported in the last published volume of the Determinations of Craft or Class of the National Mediation Board. See 3 NMB Determinations 1, 9, 16, 20, 31, 35, 49, 56, 87, 94. In the one instance in which no carrier participation is indicated, it was stipulated that the result would be the same as that in a companion case in which the carrier did participate. 3 NMB Determinations 6.

In four of these cases, the only participants in the hearing were the carrier and a single labor organization. *American Airlines, File No. C-2380*, 3 NMB Determinations 20 (1955); *American Airlines, File No. C-2783*, 3 NMB Determinations 49 (1959); *Northeast Airlines, Case No. R-3445*, 3 NMB Determinations 87 (1960); *Trans-World Airlines, Case No. R-3479*, 3 NMB Determinations 94 (1961).

The determinative evidence in many of these craft or class hearings was furnished by the carrier. See for example, *United Air Lines, File No. C-2139*, 3 NMB Determinations 9, 11 (1953).

The distinction between the craft or class issue and the selection of the representative for the craft or class has been recognized by the Board in craft or class determinations in which the carrier has participated.

In *Trans-Texas Airways and North Central Airlines, File Nos. C-2252 and C-2389*, 3 NMB Determinations 16 (1956), the International Association of Machinists invoked the services of the Board to investigate a dispute among the stock and storeroom employees of the two carriers. The Air Line Agents Association "took the position that the applications of the IAM should not be docketed unless the Board has determined that stock and storeroom employees are a separate craft or class for representation purposes under the Railway Labor Act." The Board thereupon held a hearing on the craft or class issue—a hearing in which both carriers participated—and only after

concluding that the stock and storeroom employees constituted an appropriate craft or class of employees of the two carriers did the Board direct that the applications of the IAM would be docketed.

In *Northeast Airlines, Inc., Case R-3445*, 3 NMB Determinations 87 (1960), the airline protested job titles listed in the labor organization's application "and requested a hearing on the subject of this application." The labor organization also requested a hearing. A hearing was held at which "both the Carrier and [the union] were represented by counsel, were given full opportunity to be heard, to examine and cross-examine witnesses, and both filed briefs in support of their respective positions." (p. 88.) After the Board made specific findings respecting the various contested classifications, the application was docketed. Here again, the craft or class dispute and the representation question were separated and the carrier was heard on the former.

An earlier Board case involving the clerical craft or class presents an ironical note in light of the Board's position in this case. In *KLM, File No. C-2098*, 3 NMB Determinations 1 (1953), the Transport Workers Union of America (TWU) invoked the Board's services to investigate a representation dispute among what it described as the "operating clerical employees of KLM Royal Dutch Airlines." A hearing was held on the appropriateness of the requested craft or class at which the carrier and other labor organizations appeared and opposed the TWU. The Board, in dismissing the application, held that the TWU had not presented any evidence in support of its position. The Board cited from the brief of KLM:

> "As well stated in the brief filed on behalf of KLM, 'it is a fundamental principle of administrative law that decisions of administrative tribunals must be based upon evidence in the transcript of the proceedings before them.'" at p. 4.

Although the Board continues to give lip service to its view that a carrier cannot be a party in a representation proceeding, it nonetheless accepts the carrier as a *de facto* party since the carrier peculiarly possesses the knowledge needed to determine the craft or class issues. Thus in the *Eastern Air Lines* case, No. R. 3639, p. 3, December 5, 1963, the Board stated:

> "Eastern Air Lines, that [sic] carrier here involved, contends for a grouping of employees contrary to either of the contesting unions. It should be observed that under the Railway Labor Act, a carrier is not a party in representation disputes. However, in the Board's investigation of such matters under Section 2, Ninth, of the Act, it must rely on the carrier for information needed in considering the dispute. Accordingly, *the views of the carrier on matters of this nature have been received and taken into account.*" (Emphasis added.)

Thus the government's assertion of a consistent Board construction of the Railway Labor Act as precluding carrier participation in proceedings under Section 2 Ninth is simply not supported by Board practice, which has consistently, except for this case, been to the contrary.[13]

D. Conclusion.

The Railway Labor Act—like the National Labor Relations Act—imposes the power and duty on the administrative agency to determine craft or class or bargaining unit questions. Although the Railway Labor Act does not

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13. The Mediation Board, through a committee designated under Section 2 Ninth, is currently conducting a hearing relating to the composition of the mechanics craft or class of employees at United, Eastern Air Lines and Seaboard World Airline. The three carriers are participating in the hearing and the committee has requested the carriers to be the first parties to present evidence. The hearing was convened on December 4, 1964, and formal presentation is scheduled to start on January 7, 1965. NMB Case Nos. R-3712, 3713, 3714.

specifically require a hearing, it does require an "investigation" and designation by the Mediation Board of the employees entitled to participate in the election. Employers under the National Labor Relations Act—under statutory provisions held to be analogous to those of the Railway Labor Act[14]—have always been accorded the right to be heard on bargaining unit determinations and this right has been accorded due process protection. *NLRB* v. *Ideal Laundry & Dry Cleaning Co.*, 330 F. 2d 712 (C. A. 10, 1964). See also *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146 (1941).

Employees and labor organizations have no greater rights under the Railway Labor Act respecting the craft or class question than does the carrier. The Mediation Board has in fact recognized the carrier interest in this issue by permitting full carrier participation in numerous administrative hearings on craft or class determinations. There is no statutory or constitutional basis for refusing to hold such a hearing in this case solely because two labor organizations have agreed on the craft or class.

III.

THE SWITCHMEN'S UNION CASE IS NO BAR TO REQUIRING THE MEDIATION BOARD TO PROVIDE A FAIR PROCEDURE.

The government contends that the "decision" of the Mediation Board to adhere to its 1947 craft or class determination is not reviewable under the doctrine of *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) (NMB Brief, 60).

As we have shown, the Board made no such "decision," and if it had, such a decision would not be consistent with

14. *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 44 (1937).

the duty as the Board itself sees it to "find the craft or class to be what it is, not what it used to be."

Since United does not seek review of the merits of the Board's determination but only that the Board be required to make that determination on the basis of evidence and in accordance with the requirements of the statute and of procedural due process, the reliance on *Switchmen's* is misplaced. *Switchmen's* involved no such questions.

Clearly, *Switchmen's* did not foreclose review of constitutional questions, nor did it insulate the Board from judicial inquiry as to whether it was exercising the duty imposed on it by the Railway Labor Act.

Switchmen's was initiated by a labor union which protested a determination made after hearing by the Board that a craft or class had to be system-wide and include all employees of the carrier in the classification. The Court noted that there was no provision for review of craft or class determinations under the Railway Labor Act, and reasoned that since Congress had created the "right" of majority representation, "*all constitutional questions aside,* it is for Congress to determine how the rights which it creates shall be enforced." 320 U. S. at 301. (Emphasis added.)

The origin of the right asserted by the labor union in *Switchmen's* is not the same as that asserted by United here. "The privilege of becoming an 'exclusive bargaining' agent . . . is a creature of Congress to whose grant Congress was therefore free to attach such conditions as it saw fit." *Fay* v. *Douds,* 172 F. 2d 720, 724 (C. A. 2, 1949). United's right, however, was not created by Congress, but rather was limited by Congress. Hence even if this case sought judicial review of the merits of the Board's craft or class determination it would not be barred by

Switchmen's. This case raises the constitutional question to which *Switchmen's* does not apply.[15]

As a preliminary step to its holding that Board craft or class determinations are not reviewable, the Court held in *Switchmen's* that Congress had imposed on the Board the duty to make such determinations. That the Court did not intend to foreclose all judicial examination of the exercise of this duty is apparent from a footnote comment in *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 336 n. 12 (1943), decided the same day:

> "Whether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth and, if so, the type or types of situations in which it may be invoked present questions not involved here."

The instant case involves the Board's obligation under the Constitution and the statute to utilize fair procedure in making the craft or class determination. *Switchmen's* is no bar to review of the Board's failure to exercise this duty.

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15. Alleged constitutional defects in Board proceedings have been consistently reviewed. *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 905 (C. A. D. C., 1961), cert. den. 368 U. S. 956 (1962); *Air Line Stewards and Stewardesses Ass'n* v. *National Mediation Board*, 294 F. 2d 910 (C. A. D. C., 1961), cert. den. 369 U. S. 810 (1962); *WES Chapter, FEIA* v. *National Mediation Board*, 314 F. 2d 234 (C. A. D. C., 1962). Although the action of the Board was upheld in each of these cases, the court recognized that the Board was not exempt from constitutional limitations of due process. In the *WES Chapter* case it was charged that the Board deprived the appellant union of due process in not fully investigating charges that a rival union was employer dominated. The Board had held a hearing on the charges, but declined to compel the attendance of certain witnesses. The Court held that "Due process of law would not appear to require more in the circumstances than was accorded appellant." 314 F. 2d 234, 238.

IV.

THE FORM OF THE BOARD BALLOT CONTRAVENES THE EXPRESS PROVISION OF THE RAILWAY LABOR ACT THAT A MAJORITY OF THE EMPLOYEES SHALL HAVE THE RIGHT TO DETERMINE THE REPRESENTATIVE OF THE CRAFT OR CLASS.

In *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937), an employer challenged the validity of a Mediation Board certification of a union as the representative of the blacksmith craft or class because the union did not receive a majority of all eligible votes, but only a majority of those participating in the election. The carrier relied on Section 2 Fourth of the Railway Labor Act—the source of the employees' right to select a representative—which provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

In upholding the validity of the certification, the Court stated:

> "Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. [citations.] *Those who do not participate 'are presumed to assent to the expressed will of the majority of those voting.'* . . ." 300 U. S. 515, 560. Emphasis added.[16]

16. The cited cases all related to elections on bond or other financing propositions—elections in which the choice was either "yes" or "no." It is significant that the Court did not cite elections involving public office where somebody must be elected and the voter is given a choice only among alternative candidates. In the Court of Appeals the Brotherhood (petitioner in No. 138) contended that a representative has to be designated in a Mediation Board election, just as a governor or president has to be elected. This argument is not urged by the Brotherhood here.

The *Virginian* case was decided in March 1937. In July 1937, the National Labor Relations Board began to provide space on its ballots for a "no" vote. Second NLRB Annual Report (1937), p. 114 n. 16. This policy of the NLRB was attacked in *Interlake Corp.*, 4 NLRB 55 (1937). A union there contended that allowing employees to vote for no representation "was placing too much emphasis on the rights of a minority." The union also argued that employees desiring no representation could simply refrain from voting.

The NLRB responded by stating that the Wagner Act did not require an unwilling majority to bargain through representatives but rather guaranteed the right of a majority if it chose to exercise it.

> "The policy adopted by the Board [NLRB] is designed merely to make sure that the votes recorded for a particular representative express a free choice rather than a choice in default of the possibility of expressing disapproval of both or all proposed representatives."

With respect to the union's contention that the unwilling employee could simply not vote, the Board answered:

> ". . . Those not voting would be presumed to acquiesce in the choice of the majority who do vote, and thus the employee who does not desire to be represented by either designated union would not express this preference by refraining from voting." 4 NLRB 55, 61.

Since that time the National Labor Relations Board has consistently provided a space on its ballot for employees to vote for no representation.[17] Although Section 9(a) of the

17. Prior to the 1937 change by the National Labor Relations Board in the form of its ballot, it certified only a union receiving the vote of a majority of those eligible to participate. *First NLRB Annual Report* (1936), p. 108. For a brief period after it was created, the Mediation Board followed the same policy. *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957* (1958), p. 16. Under such a policy, non-voting was an effective expression of a desire for no representation since non-

Wagner Act, which provided the right of the majority to vote for a collective bargaining representative, was modeled after Section 2 Fourth of the Railway Labor Act,[18] the National Mediation Board has consistently refused to allow an employee to vote for no representation.

Section 9(a) of the Wagner Act was readopted by Congress in 1947 as part of the Taft-Hartley amendments (61 Stat. 143), but Congress has had no occasion to look at Section 2 Fourth of the Railway Labor Act since 1934.[19]

The difference in treatment under the two statutes is not explicable on the ground of a difference in their purposes. The government says that Section 2 Ninth of the Railway Labor Act "reflects a Congressional policy of encouraging the development of collective bargaining." (NMB Brief, 33.) But the policy of the Wagner Act was expressly stated to be the "encouraging [of] the practice and procedure of collective bargaining." Section 1, 49 Stat. 449.

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voting did not affect the size of the absolute majority of all eligibles which was needed for certification. This policy was changed by both Boards in recognition of the fact that eligibles may have failed to vote out of indifference as well as a desire for no representation. But while the NLRB recognized that this change required a place for a "no" vote, the Mediation Board continued its practice of allowing a choice only among alternative representatives.

18. See Majority Vote under the Railway Labor Act, Opinion of Attorney General Tom C. Clark, 40 Op. A. G. 541, 543 (1947).

19. The government's brief refers to the 1947 amendment of Section 7 of the Wagner Act to provide that employees had the right to refrain from as well as engage in protected activities (NMB Brief, 36). The right to refrain from the exercise of the rights contained in Section 7 was implicit in the Wagner Act and was specifically added in 1947 to correlate with the addition of prohibitions against coercive acts of unions against employees—a provision not found in the original Wagner Act. Sec. 8(b)(1), 29 U. S. C. § 158, 61 Stat. 141. See Analysis by Senator Taft, 93 Cong. Rec. 7001 (1947). The Section 7 amendment had no application to the election of representatives by the majority of the employees provided in Section 9(a), which section was simply readopted in relevant part in the same language in which it appeared in the Wagner Act. Sections 7 and 9(a) of the Wagner and Taft-Hartley Acts are set out in the Appendix to this brief.

When the Mediation Board practice of not permitting an employee to vote against representation was challenged in this litigation, the Board responded that an employee under the Railway Labor Act had the duty—not merely the right—to designate a bargaining representative (R. Nos. 138 and 369, 144-45). The Board contended that there was a "mandate of Congress that representatives be designated." (R. 86.)

The legislative history of the 1934 Railway Labor Act Amendments does not support this view.

Commissioner Eastman testified that the bill—

> "does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course is left open to them, or it should be." (Hearings on H. R. 7650, House Comm. on Interstate and Foreign Commerce, 73rd Cong. 2d Sess. 1934, p. 57.)

Senator Wagner, in response to a criticism of an industry witness that the amendments would have the effect of compelling employees to join unions, stated:

> "I didn't understand these provisions compelled an employee to join any particular union. I thought the purpose of it was just the opposite, to see that the men have absolute liberty to join or not join any union or to remain unorganized." (Hearings on S. 3266, Sen. Comm. on Interstate Commerce, 73rd Cong. 2d Sess. 1934, p. 76.)

The government now acknowledges that employees have no duty to select a representative, and that its assertions to this effect in the district court do not reflect its current views (NMB Brief, 32, 33 n. 9).

Instead, the government now argues that not voting is the "equivalent of a vote against representation," and that an employee desiring no representation can therefore express

his will by simply not voting (NMB Brief, 30-32). The only ground for criticism of the form of ballot has now been removed, claims the government, by the recent Mediation Board change which adds to the face of the ballot the advice that "no employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be elected." (NMB Brief, 30, 64.)[20]

But not voting is simply not the equivalent of voting "no."

That a majority of eligible voters may not participate and hence may thereby frustrate the selection of a bargaining representative does not insure the converse of the proposition: that the bargaining agent selected does in fact represent the desires of a majority of the employees. A simple example illustrates that the results of an election may differ substantially depending on the form of ballot.

Assume a craft or class of 13 employees, 6 of whom desire no representation, 4 desire Union A and *no other*, and 3 desire Union B and *no other*. The fact that an employee may prefer no representation rather than representation by a union to which he has been opposed in a hotly contested campaign is neither unrealistic nor unusual.

Under the new Mediation Board form of ballot, as well as the old, the 6 who desire no representation can manifest this

20. The government argues that for over 30 years and in over 3400 elections the Mediation Board has used a form of ballot which did not provide a space for a "no" vote, and that this practice is entitled to great weight as an exercise of "expert judgment," which has been unquestioned by Congress (NMB Brief, 25-30). But for these same 30 years the ballot failed to advise employees that they were not required to vote, or what percentage of total votes would constitute a valid election. This "old ballot was unfair," in the opinion of the Solicitor General, and for that reason the Mediation Board placed on it the above quoted legend effective November 23, 1964 (NMB Brief, 30, 63-65). This hardly spells out a very persuasive case for administrative expertise. In any event, whatever consistent practice there had been for 30 years certainly came to an end on November 23, 1964.

desire only by not participating in the election. The remaining 7 employees will then cast 4 valid ballots for Union A and 3 valid ballots for Union B. Since 7 employees—or a majority of the 13—have participated in the election, the election is valid under the Board's procedures. A majority of those participating, or 4, will then determine the representative. Hence Union A will be the representative for all 13 employees, although it was the choice of only 4.

If under the same circumstances the National Labor Relations Board were to conduct the election the results would be different. The 6 employees who wanted no representation could cast valid ballots for "no union;" 4 would vote for Union A and 3 for Union B. Since no choice would have a majority of the total votes cast, under run-off procedures, Union B, having the lowest number of votes, would be dropped and a run-off election would be held between the choices of Union A and "no union." Now the 6 employees would be joined by the 3 who voted for Union B and preferred no representation rather than Union A, and the vote would be the same 4 for Union A and 9 for "no union."[21]

The government's answer to this example—which was set out in United's complaint (R. 7)—and a similar one used by Judge Youngdahl in his opinion (R. Nos. 138

21. The run-off procedures of the National Labor Relations Board have varied, as the government states (NMB Brief, 30 n.8). However, at all times since the "no" has appeared on the NLRB ballot, the "no" choice would appear on the run-off ballot if it received a plurality of the votes cast. The Mediation Board run-off rules provide that the two highest choices will appear on the run-off ballot (29th NMB Annual Report (1963), p. 36). The Mediation Board does not tell us here whether it would allow a "no" choice to appear on a run-off ballot if a majority participated in the election, but the number not participating exceeded the number voting for any one choice—as in the example cited above. Such a run-off should be allowed if not voting is "treated as the equivalent of a vote against representation." (NMB Brief, 30.)

and 369, 152), is that the example argues conclusions from facts. An equally valid assumption might be made, suggests the government, that the supporters of Union B might prefer Union A to no union (NMB Brief, 30 n.8).

But this answer pinpoints the vice in the Board's failure to allow a chance for a "no" vote to be cast. There is no possible way of knowing whether the non-voters were motivated by indifference or by a desire to have no representation; and neither is it possible to know how those who voted for Union B would vote in a run-off between Union A and no union.

The fact is that unless a representative receives an absolute majority of the total eligible to vote there is no valid conclusion that can be drawn from the Board's election. We do not argue that a representative must get such a vote for the election to meet the statutory requirement that the representative be determined by a majority of the employees. We would not even contend that an election is invalid simply because a majority of those eligible to vote did not participate. We do say that unless the choice of casting a valid ballot against representation is available then no valid conclusions can be drawn about the desires or presumed desires of a majority of the employees.[22]

The result of the Board's position is a perfect paradox: the certification of a union receiving less than a majority of the number eligible to vote is justified on the ground that

22. Significantly, in the only judicial examination of the Mediation Board's form of ballot prior to this litigation, the district court for the Northern District of New York held, in *McNulty* v. *National Mediation Board*, 18 F. Supp. 494 (N. D. N. Y., 1936), that the Mediation Board's failure to provide space in its ballot for a "no" union vote precluded a clear expression of majority will and that, therefore, a certification resulting from an election based upon that form of ballot was not entitled to judicial enforcement. The Board does not consider the *McNulty* case as binding on it since it was not a party to the suit (R. 86-87).

the non-voter is presumed to assent to the will of the majority of the voters (*Virginian Railway* case, 300 U. S. 515, 560); yet the employee who wants no representation is told the only way he can manifest that desire is by not voting; but under the initial presumption, by not voting he binds himself to the choice of the majority of those who do vote for representation.

If the Mediation Board really means that not voting is the equivalent of voting "no", then the question put by Judge Youngdahl to government counsel should be answered: "If you say that it is the same, why aren't you willing to agree to it?" (R. Nos. 138 and 369, 144.)

It is not the same. The Board practice does not meet the requirements of Section 2 Fourth of the Railway Labor Act that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." This statutory command is no less explicit than the requirement of the National Labor Relations Act that professional employees shall not be included in a unit with nonprofessionals "unless a majority of such professional employees vote for inclusion in such unit." NLRA Sec. 9(b)(1), 29 U. S. C. § 159. The practice of the Mediation Board here in not allowing a true expression of the desires of a majority of the employees in the craft or class is of no different order than that of the NLRA—condemned in *Leedom* v. *Kyne*, 358 U. S. 184 (1958)—in not allowing a separate vote among the professional employees.

The Railway Labor Act imposes on United "the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 548 (1937.) The Mediation Board practice enlarges upon this limited

duty and increases United's obligation without statutory warrant. Thus if the ballot question were not otherwise before this Court in this consolidated proceeding, United nonetheless would be entitled to be heard on this question.

CONCLUSION.

United does not challenge the power of Congress to regulate its labor relations, or the power of the National Mediation Board to make craft or class determinations. We are not seeking a review of the merits of a craft or class determination on this litigation.

Rather our plea is that the Mediation Board be held to some objective standards of conduct in its regulation of an employer's labor relations. For certainly basic property interests are affected by the manner in which an employer must deal with its employees under compulsion of legal sanction, including possible loss of its license to do business. The Board should not be permitted to hide behind *Switchmen's Union* to justify such unpredictable and inconsistent action as this record discloses. Here the Board says that employees have the right to select their own crafts or classes; when faced with this claim in the *UNA Chapter, FEIA* litigation, the Board argued that it was *its duty* to make this determination—not the right of the employees. In this case the Board says it relied on a 1947 determination in adhering to the same craft or class; yet in prior cases the Board has said the 1947 determination needed re-examination and, in fact, on re-examination refused to follow it. It now says that was because of unique circumstances in the other cases, yet it has refused to hold any kind of hearing in this case to determine whether the imposing of the largest single bargaining unit in the history of the air line industry will not also present unique circumstances. And despite its claimed reliance on the 1947

determination, the record discloses that the Board was ready to accept another craft or class if the labor organizations agreed to that. The Board says it consistently has interpreted the Railway Labor Act as precluding employer participation in a craft or class determination; yet the Board practice has been precisely the contrary. It contends that its form of ballot has been used for thirty years in over 3400 elections; yet after certiorari was granted in this case, the Board changed that form, admitting now that its prior form had been "unfair," and then claims here its "expert judgment" should not be disturbed. But the change it made does not reach the primary defect of the ballot in not allowing the election to reflect a true expression of the desires of the affected employees.

Switchmen's Union cannot be read as immunizing the Board from any kind of accounting for this erratic behavior. Perhaps if the Board were required to allow participation in craft or class determination as a matter of right and not unpredictable sufferance to all affected parties —not only to labor organizations seeking representation rights—then some reasoned consideration of these issues might develop.

For the foregoing reasons, we respectfully request that the Court find that a carrier has the right to be heard before the National Mediation Board on the question of the appropriate craft or class of its employees just as an employer regulated by the National Labor Relations Act has a right to be heard on the question of an appropriate bargaining unit; that the National Mediation Board may not determine craft or class questions arbitrarily and capriciously; and that the form of ballot to be used in Board elections be such as to reasonably reflect the desires of a majority of the employees in the craft or class.

The judgment of the Court of Appeals should therefore be reversed in No. 139 and affirmed in Nos. 138 and 369.

Respectfully submitted,

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January 4, 1965.

APPENDIX.

Constitutional and Statutory Provisions Involved.

U. S. Constitution, Amend. V:

> ". . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Railway Labor Act:

Section 2 Fourth, 48 Stat. 1187, 45 U. S. C. § 152 Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. *Provided*, That nothing in this Act shall be construed to

prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2 Ninth, 48 Stat. 1188, 45 U. S. C. § 152 Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordnace with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Wagner Act:

Section 7, 49 Stat. 452:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 9(a), 49 Stat. 453:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

Taft-Hartley Act:

Section 7, 61 Stat. 140:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 9(a), 61 Stat. 143:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, PETITIONER

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

No. 139

UNITED AIR LINES, INC., PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

No. 369

NATIONAL MEDIATION BOARD, ET AL., PETITIONERS

v.

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS

I

A DISTRICT COURT IS NOT AUTHORIZED TO STAY AN ORDER OF THE NATIONAL MEDIATION BOARD DIRECTING AN ELECTION UPON THE GROUND THAT THE BALLOT USED BY THE BOARD CONTAINS NO SPACE IN WHICH THE EMPLOYEES MAY EXPRESSLY VOTE *NO UNION*

The premise of our argument upon this point is the settled rule, established in *Switchman's Union* v. *Na-*

tional Mediation Board, 320 U.S. 297, that there may be no judicial interference with orders of the National Mediation Board made within its jurisdiction in representation proceedings.

> [T]he intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law. [*Id.* at 305.]

We assume *arguendo* that *Leedom* v. *Kyne,* 358 U.S. 184, introduced an exception; but the exception is confined to cases in which the Board has acted—

> in excess of its delegated powers and contrary to a specific prohibition in the Act. [*Id.* at 188.]

In our opening brief we showed that, in this case, the authority to determine the methods of resolving representation disputes, including the form and significance of any ballots, was delegated by Congress to the Mediation Board. The Board has violated no specific statutory prohibition.

There is not a word in the Act giving anyone a specific or explicit right to have a NO UNION box printed on the ballot, or laying any specific prohibition concerning the form of the ballot upon the Mediation Board. United says that the ballot contravenes a provision in Section 2, Fourth, which reads:

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

Certainly that is not a "specific prohibition" against the present form of ballot. Nor can an election in which every employee is given a chance to indicate which of the rival unions, if any, he wishes to designate and is clearly notified that he need make no designation be fairly said to deprive the majority of the craft or class of the right to determine "who shall be the representative."

The details of United's and ABNE's criticisms of the ballot show that they are not complaining of the violation of a specific and explicit statutory requirement, as in *Leedom* v. *Kyne,* but are criticizing the Board's application of the broad policies of the Act and its expert judgment as to the most appropriate way of performing its duty under Section 2, Ninth, of determining "who are the representatives of such employees designated and authorized in accordance with the requirements of [the Act]." Thus, United bases its argument entirely upon the details of a hypothetical situation in which it says that the Board will be misled by the present form of ballot into certifying a union that is not the choice of a majority. Suppose, United says (Br. 51–52), that there was a class or craft of 13 employees, 4 of whom desired Union A *and no other,* and 3 of whom desired Union B *and no other.* If an election were held 6 employees would refrain from voting, 4 would vote for Union A, and 3 would vote for Union B. The 4 who voted for Union A, United says, would determine the representative. The argument is too premature and speculative to be taken seriously.

1. No election has been held in this case. No one knows how many employees will vote, and how the valid ballots will be distributed.

2. The set of facts posited by United is artificial. United asks us to assume that all the employees voting for Union A are for that union *and no other*, and that the employees voting for Union B are for that union *and no other*. The "and no other" is deceptive. No election ever has been conducted, and none ever will be conducted, in which there is anything to reveal whether the employees who vote for a particular union prefer no collective bargaining to the designation of any other union. Many observers would say that the probabilities are just the reverse. The National Labor Relations Board, for example, held the view that "where in an original election the combined vote for two labor organizations constitutes a majority of the votes cast, the employees have expressed a desire to bargain collectively through some representative." (*National Labor Relations Board* v. *Standard Lime & Stone Co.*, 149 F. 2d 435, 439 (C.A. 4), certiorari denied, 326 U.S. 723, citing National Labor Relations Board Fifth Annual Report, p. 60).

3. Deciding what to do where the balloting does not produce an absolute majority of all the employees for a particular representative is peculiarly a question for the Mediation Board rather than the courts. Different courses have been followed at different times and by different agencies during the development of our labor relations policies.[1] It has sometimes been suggested that, at least where a

[1] See the cases cited on p. 31 of our opening brief.

majority votes, a certification may be issued to the representatives designated by a majority of those voting because the non-voters should be presumed to have left the choice to the will of the voters. *E.g., Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515, 559–561. That rationale cannot be entirely squared with the instruction that those who oppose the designation of any representative should refrain from voting, for the non-voters may include employees affirmatively opposed to the designation of representatives as well as employees who are indifferent and content to leave the matter to others. The Mediation Board, however, has never, as far as we can determine, committed itself to that particular rationale, but remains free to choose the appropriate course when the voting is over and the facts are developed.[2]

The fairness of any particular course obviously depends upon the factual inferences to be drawn from a particular distribution of the ballots. Where a majority of the eligible employees has designated one or another of the putative representatives, it may be a fair inference that all who designated some union prefer collective to individual bargaining, and there-

[2] In 1947, the Attorney General stated his opinion that the Board could in its discretion certify the union receiving the most votes in an election where a majority of the eligibles failed to participate, relying upon the rationale that those who fail to vote can be presumed to assent to the determination of those voting, 40 Op. Attorney General 541. The Board considered this opinion but nevertheless decided to continue its practice of refusing to certify a representative unless an absolute majority of eligibles voted for some representative. See, 14th Annual Report, National Mediation Board (1948), pp. 8–9.

fore the union with the most designations is the majority choice. Cf. *National Labor Relations Board v. Standard Lime & Stone Co.*, 149 F. 2d 435 (C.A. 4), certiorari denied, 326 U.S. 723; *R. K. LeBlond Machine Tool Co.*, 22 NLRB 465; National Labor Relations Board Fifth Annual Report, p. 60. Perhaps some kind of a runoff may be appropriate. Possibly the proper course depends upon more detailed knowledge of the distribution of the ballots. These are the very questions that the Mediation Board was set up to answer. An attack on the Mediation Board's action, even after it occurred, would show no more than that the Board might have made a mistake in performing the duties confided to it by Congress, an allegation which, under *Switchmen's Union*, is not ground for judicial review.

4. Since no election has been held in this case, the Board has drawn no conclusions from the balloting. The courts may not interfere with a representation election on the ground that circumstances *may* develop later in which the Board *may* draw conclusions from the balloting which *may* lead to the certification of a representative which *may* not be the majority choice.

ABNE's brief also asks the Court to venture into areas which the statute assigns to the Mediation Board. One branch of the argument is that the ballot the Board proposes to use puts the employees opposed to labor unions at a disadvantage. Whether that is true, and, if so, whether it goes beyond the policy of the Act, are questions for the Board to decide (see our opening brief pp. 30–37). The other branch

of ABNE's argument is that the instructions on the ballot are confusing. The alleged confusion seems to arise from counsel's picking apart a sentence from the government's brief, not from any ambiguity in the instructions. The complete answer, however, is that the writing of instructions for the ballot is the Mediation Board's responsibility and alleged imperfections or ambiguities are not ground for judicial interference with the conduct of a representation proceeding. Indeed, the fact that these are the only targets of ABNE's criticisms measures the extent of its failure to show that the Board has acted "in excess of its delegated powers" or "contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne, supra*).

The short of the matter is that United and ABNE, being unable to point to any specific prohibition which the Board has violated, are forced to argue in terms of broad generalities contrasting what they say would be the effect of the proposed form of ballot with what they say are the conclusions to be drawn from the general provisions and policies of the Act. We think that they are wrong and that the Board has been entirely faithful to the policy of the Act. But that question, we emphasize, need not be decided because it is the essence of the *Switchmen's* doctrine that, in proceedings under Section 2, Ninth, Congress has committed to the Board for its final and binding decision the responsibility for particularizing and applying to concrete situations the policies and general instructions contained in the Act.

765-561—65——2

II

A CARRIER HAS NO RIGHT TO PARTICIPATE IN A REPRESENTATION PROCEEDING

Since our argument upon this point is fully developed in our opening brief, it is here necessary only to correct two misapprehensions introduced by the brief for United Air Lines.

1. On page 35 of its brief United totally misstates the government's position. The very heart of our argument, upon which our case must stand or fall, is that because the two unions were in agreement as to the craft or class in which the employees wished to organize, the Mediation Board was bound to accept their wish as a matter of substantive law and the Board had no further function to perform. That is the view the Mediation Board took in this case (R. 139) and, we submit, is the command of the Railway Labor Act.

The confusion probably arises from our failure to explain with sufficient clarity several related but quite different aspects of the function of the Mediation Board in representation proceedings. Under the Railway Labor Act disputes about the bargaining unit may involve these questions:

(i) Whether a party to the representation proceedings is seeking to have included in a bargaining unit and to represent certain persons who should *not* be members of *any* bargaining unit. In other words, a union might be attempting to have included within a craft certain management personnel who are not

really "employees" within the scope of the Railway Labor Act.

(ii) Whether the unit or units in which the employees are seeking to organize is *a* cognizable "craft or class". This is a very loose grouping, and there are a great variety of crafts or classes, many overlapping and inconsistent, in which self-organization may take place.

(iii) In which of the putative crafts or classes do the employees wish to organize?

With respect to the first category, the National Mediation Board might be asked by a union or unions to resolve a representation dispute among a group which includes within it persons in the service of the carrier who are not emcompassed within the term employee, as that term is used in the Railway Labor Act. Section 2, Fourth of the Act grants only to any craft or class of *employees* the right to organize and to determine the representative of the craft or class; and Section 1, Fifth of the Act limits the scope of the term "employee." Thus, the Mediation Board could not, consistent with the statute, permit a union or unions to include within a bargaining unit persons in the carrier's service who are not subject to the Act, even if the competing employee organizations are in agreement as to the scope of the bargaining unit. Upon that quasijurisdictional question which the unions cannot resolve by agreement, it may be proper to accord the employer a hearing. Such was the situation in three cases cited in United's brief (p. 41) where the Board held hearings on the scope of the bargaining units, even though there was no dispute

among unions and, in fact, only one union was involved in each case. See, *In the Matter of Representation of Employees of the American Airlines, Inc.*, File No. C–2783 (1959), 3 Determination of Craft or Class of the National Mediation Board, p. 49 (where the question was whether "Technical Foremen" performed management functions); *In the Matter of the Application of Transport Workers Union of America,* Case No. R–3445 (1960), 3 Determination of Craft or Class of the National Mediation Board, p. 87 (where the issue was whether various job classifications such as "Agency Sales Manager," "Lost and Found Supervisor," "Industrial Nurse," etc., were employees or subordinate officials and thus covered by the Act or whether they were excluded as supervisory personnel); *In the Matter of Representation of Employees of The Trans World Airlines, Inc.*, Case No. R–3479 (1961), 3 Determination of Craft or Class of the National Mediation Board, p. 94 (similarly involving the question whether various job classifications, *e.g.*, "General Foremen," "Chief Inspector," "Chief Storekeeper," etc., were supervisory personnel and thus should be excluded from the bargaining unit). Since there is no such question in the present case, the three cases cited by United are irrelevant.

As to the second category, the Mediation Board does, under the Railway Labor Act, have to decide whether a particular grouping sought by the employees wishing to organize is cognizable as a craft or class. Section 2, Fourth, granting the majority employees of "any craft or class" the right to select

the representative, presupposes that the grouping be *a* recognizable craft or class. If the employees attempted an unreasonable grouping not acceptable as *a* craft or class, the Board could not in conformity with the Act certify a representative for the unit. Whether the employees here involved constituted a cognizable craft or class was the question which the Mediation Board decided in 1947 and, in a sense, reaffirmed in denying ABNE's request (see our opening brief pp. 60–61.) There was no real issue upon this point in the present case. Even United must agree that the unit agreed upon by the Clerks and Machinists is a craft or class. United itself expressed that view in 1947, and the grouping is familiar on other carriers.

We come now to the third category. As long as the personnel involved are employees of the carrier subject to the Act, and as long as a particular grouping or groupings of those employees constitute a cognizable craft or crafts, the Railway Labor Act gives the employees desiring to organize and bargain collectively the substantive right to determine the crafts or classes in which they will organize. Where there is only one union, or where the rival unions are in agreement as to the craft or class to be represented, there is no further issue concerning craft or class for the Mediation Board to determine. It is only when two groups of employees are seeking conflicting bases of self-organization that the Mediation Board has occasion to determine the bargaining unit and then only as an adjunct to deciding who

are the representatives in any dispute between the unions.

In this controversy, there has never been any suggestion that management personnel outside the scope of the Act is being included or that the proposed unit is not a craft or class. The organized employees, speaking through the only two unions, were in agreement on the craft or class to be represented, and there was, therefore, as a matter of substantive law, no issue for the Mediation Board.

The foregoing conclusions, we submit, flow unmistakably from the words of the statute, the legislative history, and the consistent administrative interpretation, as set forth in our opening brief. Neither United nor ABNE has called attention to any contrary indication in the statute, the legislative history, or the course of administration.

There is nothing to the contrary in the materials quoted by United at pages 36–39 of its brief. *UNA Chapter, FEIA* v. *National Mediation Board,* 294 F. 2d 905 (C.A. D.C.), certiorari denied, 368 U.S. 956, was a case in which the competing unions were *in disagreement* upon the constituency in which the election should be conducted. In such a case the Mediation Board has to make the unit determination as an incident to its duty of deciding the dispute between two groups as to who are the representatives designated by a majority of the employees. The government has never suggested the contrary. Our contention is that when the unions are in agreement upon "any craft or class," confining it to employees, then there is no issue for the Board to resolve. Thus, the statements quoted by United miss the mark.

2. United also misunderstands and therefore misstates the practice followed by the Mediation Board with respect to the participation of employers in representation proceedings. The Board's practice with respect to the employer's participation has been consistent for 30 years. As long as the employer is a carrier subject to the Act and the personnel involved are employees subject to the Act, the employer is *never* admitted as a *party* or given the *right* to be heard as a party in a case under Section 2, Ninth. When the Board is called upon to decide whether a particular grouping is a "craft or class," it may need information from the employer, and the employer's views or expert opinion may be taken into account. The same thing may occur when two unions are in dispute about which of two overlapping crafts or classes shall be voted in an election. However, United fails to recognize the distinction, repeatedly made by the Board, between recognizing a *right* of the carrier to be heard (which the Board does not) and *permitting* the carrier to submit information or views when the Board in its discretion believes that such submission will be helpful (which the Board often does). The distinction is made by the Board in the very cases relied upon by United in its brief (pp. 40–43).

Thus, in *In the Matter of Representation of Employees of the KLM Royal Dutch Airlines,* File No. C–2098 (1953), 3 Determination of Craft or Class of the National Mediation Board, p. 1, where one union sought and was granted a hearing on whether a particular grouping of employees constituted "'an appropriate unit' for representation purposes" (p. 2),

and where three other unions participated in the hearing, the Board pointed out in its opinion (p. 2):

> The carrier was represented at the hearing at the request of the Board to present such factual information as might be requested.

For similar statements explaining that a carrier was permitted to be present for the purpose of supplying the Board with whatever information the Board might request, see the following cases cited by United: *In the Matter of Representation of Employees of the United Air Lines, Inc.,* File No. C–2139 (1953), 3 Determination of Craft or Class of the National Mediation Board, p. 9 ("The carrier was represented for the purpose of presenting to the Board such factual evidence as it requested * * *"); *In the Matter of Representation of Employees of the Trans-Texas Airways, Inc.,* File Nos. C–2252 and C–2389 (1956), 3 Determination, pp. 16–17 ("Representatives of both carriers were present and furnished factual information * * *."); *In the Matter of Representation of Employees of the Sabena Belgian World Airlines,* File No. C–2493 (1956), 3 Determination, p. 25; *In the Matter of Representation of Employees of the Trans World Airlines,* File No. C–2506 (1956), 3 Determination, pp. 31, 32; *In the Matter of Representation of Employees of the United Air Lines, Inc.,* File No. C–2508 (1957), 3 Determination, pp. 35, 36; *In the Matter of Representation of Employees of the United Air Lines, Inc.,* File No. C–2946 (1961), 3 Determination, p. 56 (where the hearing was conducted by a Committee rather than the Board, and the Committee invited the carrier to appear "for the purpose of

giving such factual information bearing upon the issue involved as the Committee might request"); *In the Matter of Representation of Employees of the Pan American World Airways, Inc.*, Case No. R–3262 (1958), 3 Determination, pp. 76, 77.

The Board's opinions underscore the distinction between (a) proceedings under Section 2, Ninth, involving questions of the appropriate groupings of employees for bargaining purposes and the identity of their representatives, where the substantive rights are exclusively the employees', and (b) proceedings involving other questions in which the carrier may properly have some interest. In regard to proceedings within the first category, the Board's opinions consistently state that the carriers were invited to attend only to submit such information as the Board might request. But with respect to proceedings in the second category, involving issues such as whether the personnel are employees subject to the Act or whether the employer is a carrier subject to the Act, the Board treats the employer as a party and does not limit its role to merely submitting information. For example, in *In the Matter of Representation of Employees of the Friedkin Aeronautics, Inc.*, File No. C–2200 (1954), 3 Determination, p. 13, the Board gave the employer "full opportunity to introduce evidence * * * and to examine and cross examine witnesses." (*Id.*, p. 13). However, the issue there was whether the Board had jurisdiction over the employer, *i.e.*, whether the employer was a carrier subject to the Act. Obviously the employer has a legally cognizable in-

terest on this point.[3] The Board similarly granted the employers the right to be heard as parties in three cases cited by United where there was a dispute over whether certain personnel were employees subject to the Act or instead were supervisory personnel not covered by the Act.[4] In these cases, also, there was a basic jurisdictional issue as to which the employer would properly have an interest.

In a proceeding under Section 2, Ninth the Board may also decide other issues as to which it permits the employer to participate as a party because the latter has a legally cognizable interest in the question. For example, *In the Matter of Representation of Employees of the American Airlines, Inc.*, File No. C–2380 (1955), 3 Determination, p. 20, which United cites (Br. p. 41), a dispute arose between the carrier and a union over whether certain employees were covered by an existing collective bargaining agreement. The carrier and union were unable to resolve the dispute through a system board of adjustment, and they both requested the NMB to resolve the dis-

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[3] See also, *In the Matter of Representation of Employees of the Pan American World Airways, Inc.*, File No. C–2505 (1956), 3 Determination, p. 27; *In the Matter of Representation of Employees of the Pan American World Airways, Inc.*, File No. C–2564 (1957), 3 Determination, p. 41; *In the Matter of Representation of Employees of the Aircraft Engineering and Maintenance Company*, File No. C–2581 (1958), 3 Determination, p. 45; *In the Matter of Representation of Employees of the Thaddeus Johnson Porter Service, Inc.*, Case No. R–3278 (1958), 3 Determination, p. 82. All of these cases similarly concerned the issue whether the employer was subject to the Act, and the employer was consequently granted the right to be heard.

[4] *Supra*, p. 10.

pute. The means chosen was an application under Section 2, Ninth, by the union to represent the employees. As the Board stated (*Id.*, p. 20), "In an effort to assist the parties to dispose of this controversy, the Board agreed to accept the above described application and hold a hearing on the subject." While employing the form of a Section 2, Ninth representation dispute, the union and carrier were in essence invoking the Board's mediation function under other provisions of the Act. Where the union and employer agree to submit a controversy between them, involving the scope of a contract, to the Board for resolution, treating the employer as a party is not inconsistent with the Board's normal practice in Section 2, Ninth proceedings. Another illustration of the type of issue upon which the NMB permits a carrier to be heard, is found in *In the Matter of Representation of Employees of the Linea Aeropostal Venezolana,* Case No. R-2938 (1955), 3 Determination, p. 54. There, in connection with a representation election conducted pursuant to Section 2, Ninth of the Act, a union charged that the carrier was coercing its employees so that they would not cast ballots; the Board held a hearing at which it permitted the carrier to defend against the charge.

In sum, an examination of the Board's practice as disclosed by the cases cited by United, as well as other cases, demonstrates the lack of merit in United's allegation of administrative inconsistency. Where a case presents those basic issues which Section 2, Ninth was designed to resolve, *i.e.*, the composition of the employees' bargaining units and the identity of their

desired representatives, issues involving rights belonging solely to the employees, the Board does not permit a carrier to participate as a party. Where other questions arise in connection with Section 2, Ninth proceedings, as to which the carrier may have a legally cognizable interest, the National Mediation Board will grant the carrier an opportunity to be heard.

Thus, the statements in our opening brief are both literally and substantially true—the Mediation Board has never recognized a carrier as a party to a proceeding under Section 2, Ninth, in which there was no quasi-jurisdictional question such as whether the unions were seeking to extend collective bargaining to non-employees, and has never sought information or opinions from a carrier in any such case in which the labor organizations were in agreement upon a unit which was indisputably a craft or class.

3. There is no inconsistency between the Mediation Board's holding in *In the Matter of Representation of Employees of Northwest Airlines, Inc.*, Case No. R-2107 (1948), 2 Determination, p. 19, quoted on page 34 of United's brief, and our argument that the Mediation Board has not role to play where the employees seeking to organize are in agreement upon the unit in which they wish to bargain (assuming that it is a craft or class and that there are no other issues). All that the Board held in the cited case is that there is a dispute within the meaning of Section 2, Ninth, if there is uncertainty over a union's claim that a majority have designated it as their representative. While this may show that the dispute necessary to

set the Mediation Board's machinery in motion may be between the organized and unorganized employees, it has not the slightest tendency to support the carrier's claim of interest in the controversy and it in nowise conflicts with the proposition that the choice of a craft or class in which to bargain is for the employees seeking to organize.

Furthermore, United's statement that a carrier's duty to bargain collectively arises only under Section 2, Ninth, is patently contrary to the provisions of the Railway Labor Act. The basic duty to bargain is imposed by Section 2, Second, and again by Section 2, Fourth. Neither is dependent upon a certification.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed in Nos. 138 and 369, and affirmed in No. 139.

Respectfully submitted,

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